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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 53 C 1927

BURTON C. JOHNS, SR.,
Plaintiff,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED LABOR ORGANIZATION, AND BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCORPORATED LABOR ORGANIZATION,
Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant submits herewith his statement disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Northern District of Illinois, Eastern Division has not as yet been reported. Copies of the opinion and the orders entered pursuant thereto are attached hereto as Appendix A.

Questions Presented

1. Does not the phrase "national in scope" contained in the Union Ship Amendment to the Railway Labor Act, because of the absence of any statutory definition of the phrase, any statutory standards or criteria for determining its meaning, and any common law or commonly-accepted meaning, render the Union Shop Amendment so vague and meaningless as to violate the due process clause of the Fifth Amendment to the United States Constitution, regardless of what agency or tribunal is charged with the task of applying it? And do not the allegations of Count II of the complaint presenting this question raise a substantial constitutional issue?

2. Does not an interpretation of the Railway Labor Act, and in particular of the Union Shop Amendment thereto, requiring employees, whose compliance with a union shop agreement is contested on the ground that the railway labor organization to which they belong is not "national in scope," to take their case to the National Railroad Adjustment Board deprive such employees of the due process of law guaranteed by the Fifth Amendment and involve an unconstitutional delegation of legislative and judicial power in violation of Section 1 of Article I and Section 1 of Article III of the United States Constitution?

3. Does not an interpretation of the Railway Labor Act, and in particular of the Union Shop Amendment thereto, requiring a railway labor organization whose status as "national in scope" is disputed and whose members are therefore claimed to be not in compliance with a union shop agreement, to seek to establish that it is "national in scope" through the procedures of Section 3 First (f) of the Act deprive such organization and its members of the due process of law guaranteed by the Fifth Amendment and involve an unconstitutional delegation of legislative and

judicial power in violation of Section 1 of Article I and Section 1 of Article III of the United States Constitution?

4. Must the plaintiff, a railroad employee threatened with discharge under a union shop agreement on the ground that the union to which he belongs is not "national in scope," exhaust his "remedies" before the National Railroad Adjustment Board before seeking injunctive relief on the basis of pleadings alleging that the Union Shop Amendment is unconstitutional for the reasons urged in questions 1, 2, and 3 immediately above?

Statutes Involved

The Railway Labor Act—Sections 2 Fourth; 2 Fifth; 2 Eleventh (the Union Shop Amendment); and Sections 3 First (a), (c), and (f)—45 U. S. C. A. Sections 152 Fourth, 152 Fifth, 152 Eleventh, and 153 First (a), (c), and (f).

Statement

Introduction

This is an action by Burton C. Johns, Sr., an engineer in the employ of the defendant Baltimore and Ohio Railroad Company (B. & O.) since 1918, to enjoin the railroad from discharging him by reason of his alleged non-compliance with a union shop agreement between the railroad and the Brotherhood of Locomotive Engineers (BLE). In Count II of his complaint the plaintiff alleged that the Union Shop Amendment to the Railway Labor Act, pursuant to which the B. & O.—BLE union shop agreement was entered into, is unconstitutional. *The issues presented to the statutory three-judge district court, therefore, were the constitutional questions raised by, and the prayer for injunctive relief contained in, Count II.*

Prior to January of 1951 railroad employees were free, by virtue of the provisions of Section 2 Fourth and Fifth

of the Railway Labor Act as amended, to join or to refrain from joining any railway labor organization and to be free from discharge or other discipline or penalty for joining or refraining from joining any such organization. In short, union shop agreements were not legally permissible in the railroad field.

On January 10, 1951, that circumstance was changed by the Union Shop Amendment, Public Law 914, 81st Congress, now Section 2 Eleventh of the Act. That amendment authorized carriers and railway labor organizations to enter into union shop agreements requiring, as a condition of continued employment, that employees, within sixty days of first employment or the effective date of such an agreement, whichever is later, shall become members of the labor organization representing their craft or class. Section 2 Eleventh (c) provides, however, that in the case of employees engaged in the so-called operating crafts, namely, the engine, train, yard, and hostling services, compliance with such an agreement could be had by joining "any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services."

This case arises from the fact that plaintiff was claimed not to have complied with the union shop agreement between the B. & O. and the BLE entered into pursuant to the Union Shop Amendment to the Railway Labor Act. *Specifically it was claimed that plaintiff was in non-compliance because the union of which he was and is a member—United Railroad Operating Crafts (UROC)—was not "national in scope."* As a result of such claimed non-compliance, the defendant carrier ordered plaintiff to be discharged.

The Facts

Effective November 1, 1951, the B. & O. entered into a union shop agreement with the BLE which required certain classes of employees, including plaintiff, as a condition of continued employment, to become and remain members in the BLE or "in any one of the labor organizations, other than the Brotherhood, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service . . ." (Original Complaint, Ex. A). The contract language is taken, practically verbatim, from the language of Section 2 Eleventh.

On November 1, 1951, the effective date of the Union shop agreement, plaintiff was a member of the Brotherhood of Locomotive Firemen & Enginemen (BLF&E) and continued membership therein until April 1, 1953. On or about December 30, 1952 plaintiff joined UROC and has maintained his membership to date. No question has been raised as to plaintiff's compliance with the union shop agreement during the period of his membership in the BLF&E.

On or about April 29, 1953 plaintiff was first notified by the B. & O. that he had been cited by the BLE for non-compliance with its union shop agreement. Again on July 14, 1953 plaintiff was notified by the railroad that he had been cited for non-compliance. After hearings before company officials, the railroad informed plaintiff that it had determined that his membership in UROC did not constitute compliance with the union shop agreement and ordered his discharge effective September 19, 1953.

Court Proceedings

On September 17, 1953 plaintiff filed his original complaint alleging, *inter alia*, that his membership in UROC constituted compliance with the union shop agreement and

requesting temporary and permanent injunctive relief against his threatened discharge. On September 18, 1953 a temporary injunction was issued as prayed in the original complaint.

Thereafter, on December 2, 1953, pursuant to leave of court, plaintiff filed an amendment to the complaint, namely, Count II: For Declaratory and Injunctive Relief and For Convening of Three Judge Court, attacking the constitutionality of Section 2 Eleventh of the Railway Labor Act. On December 10, 1953, by agreement of plaintiff and defendant railroad, the BLE was permitted to intervene under Rule 24(b) of the Federal Rules of Civil Procedure. And on December 17, 1953 the BLF&E was permitted to intervene under Rule 24(b).

The Pleadings

Insofar as the constitutional issues are involved, the pertinent pleadings are the following: 1) Count II of the complaint; 2) Answer of the defendant B. & O. to Count II; 3) Motion of the defendant BLE to dismiss; 4) Answer of the defendant BLF&E.

The issues contained in original complaint were not before the three-judge court.

The legal contentions of the plaintiff, as embodied in Count II of the complaint, may be summarized as follows:

First, prior to the Union Shop Amendment to the Railway Labor Act, the plaintiff could not legally be compelled to join a labor organization as a condition of employment; he could not be legally discharged for joining or for failing to join. Sections 2 Fourth and Fifth of the Act gave the plaintiff this protection.

Second, apart from the Union Shop Amendment, Section 2 Eleventh of the Act, the B. &O.—BLE agreement is invalid and unenforceable as being in violation of Sections 2 Fourth

and Fifth of the Act. Consequently, apart from the Union Shop Amendment, the B. & O. cannot legally fire the plaintiff for his failure to belong to a "national in scope" union.

Third, the Union Shop Amendment is unconstitutional in violation of the Fifth Amendment to the United States Constitution for the reason that the rights of railroad employees like the plaintiff are made to depend upon a phrase "national in scope", which is so vague and meaningless that reasonably intelligent men, in attempting to make the decisions which the Act and agreements pursuant to it require them to make if they desire to continue their employment, can only guess at its meaning.

Fourth, the Union Shop Amendment is unconstitutional regardless of whether the determination as to the "national in scope" status of a railway labor organization rests with the National Railroad Adjustment Board, with a System Board of Adjustment acting in lieu of the National Board, with the Secretary of Labor and a three-man board set up under Section 3 First (f) of the Act, or with the courts. This is necessarily so, for, regardless of what body or tribunal seeks to pass on the question, the individual employee, here the plaintiff Johns, is compelled to make a guess upon which his job depends without the aid of any statutory guides, criteria, or standards. Furthermore, the so-called administrative agencies, namely, the National Railroad Adjustment Board and the three-man board constituted under Section 3 First (f), are essentially private in nature and operate without regard to essential procedural safeguards and therefore are constitutionally incapable of receiving a delegation of legislative or judicial power in view of the due process clause of the Fifth Amendment, Section 1 of Article I, and Section 1 of Article III, of the United States Constitution.

The answers of the B. & O. and of the BLF&E admit

virtually all of the essential facts pleaded in Count II but deny the legal and constitutional conclusions.

The motion to dismiss of the BLE urges that the court lacks jurisdiction of the subject matter of Count II of the complaint for the following reasons: 1) the Railway Labor Act deprived the courts of jurisdiction to decide any issues, including constitutional issues, arising out of a grievance of an employee against a carrier or out of the interpretation and application of a union shop agreement prior to resort to the administrative remedy allegedly available in the National Railroad Adjustment Board; 2) the Railway Labor Act deprived the courts of jurisdiction to determine any issues, including constitutional issues, arising out of a claim that any organization is national in scope prior to resort to the Secretary of Labor and the three-man board constituted under Section 3 First (f); 3) no substantial constitutional issue is presented.

The motion of the BLE also asserted that Count II of the complaint failed to state a cause of action because: 1) the plaintiff had not exhausted his administrative remedies by reason of the failure of the organization to which he belonged namely, UROC, to resort to the procedures provided in Section 3 First (f); 2) the plaintiff had not exhausted his administrative remedy before the National Railroad Adjustment Board; 3) the plaintiff's administrative remedies afford him a plain, adequate and complete remedy with respect to any of the rights involved in this case.

Decision of Three-Judge Court

Argument was had before the three-judge court, consisting of Circuit Judge Lindley and District Judges La Buy and Hoffman on January 5, 1954. On January 20, 1954, the court, ruling that it lacked jurisdiction of the subject-matter, dissolved itself and returned the cause to Judge

La Buy for further proceedings. The opinion of Judge Lindley, Appendix A attached hereto, stated that "no substantial constitutional question is raised by the amended complaint" because of the failure of the plaintiff to exhaust his administrative remedy before the National Railroad Adjustment Board. Thereafter, on the same day, Judge La Buy dissolved the preliminary injunction and dismissed the case for lack of jurisdiction, the order of dismissal covering both the original complaint and Count II.

Jurisdiction

The judgment of the District Court was entered on January 20, 1954. A petition for appeal is being presented to the District Court herewith, namely, on February 8, 1954.

This is a case in which the plaintiff is seeking to enjoin the operation of an Act of Congress—the Union Shop Amendment to the Railway Labor Act. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The Supreme Court has jurisdiction to review a judgment of a three-judge court on direct appeal in circumstances such as these. See *California Water Service Co., et al.* v. *City of Redding, et al.*, 304 U. S. 252 (1938), where the three-judge court ruled that no substantial federal question was presented and dismissed the complaint; and *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752 (1947), where the complaint was dismissed on the ground that the plaintiff had not exhausted his administrative remedies.

The Questions Are Substantial

I

THE STATUTORY LANGUAGE "NATIONAL IN SCOPE" IS SO VAGUE AS TO RENDER THE UNION SHOP AMENDMENT TO THE RAILWAY LABOR ACT REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Union Shop Amendment to the Railway Labor Act and the union shop agreement executed pursuant thereto by the B. & O. and the BLE required the plaintiff, Mr. Johns, in order to comply with the agreement, to become a member either of the BLE or of some other railway labor organization "national in scope". Thus, one of the alternative choices presented to plaintiff to insure his compliance with the union shop agreement and thus to avoid discharge, loss of seniority, and related rights, was that he join a railway labor organization "national in scope".

But the phrase "national in scope" is so vague and uncertain as not to be susceptible of rational comprehension by reasonably intelligent men. In compelling the plaintiff to risk the loss of his job on his guess as to the meaning of a phrase, therefore, Section 2 Eleventh comes into direct conflict with the fundamentals of due process of law.

The slightest effort to attribute real meaning to "national in scope" demonstrates its vagueness:

Does it mean a union whose members are employed by more than one railroad? If so, by how many?

Does it mean a union whose membership is more or less generally disseminated throughout the country? If so, what constitutes more or less general dissemination—membership in 10 states, in 20, in 48?

Does it mean a "large" union? If so, how large, and how is its size to be measured? Is the measurement in absolute numbers, and if so, must it have 5,000 members,

10,000, or as many as 50,000? Or is the measurement a relative one, in terms of the ratio of members to those eligible for membership in the craft or crafts? If this is the test, is 5% of the potential enough, or must it be at least 15% or 25%?

Does it mean a union which holds a substantial number of contracts with railroads? If so, how many?

Obviously, questions of this kind could be posed almost endlessly. For, the inescapable fact is that the phrase "national in scope" has no well-defined meaning of its own, resort to the dictionary is not at all helpful, and the statute contains no criteria or standards for determining the meaning of the phrase whatsoever. Depending upon what railroad, or Brotherhood, or Brotherhood officer is deciding, or upon whether the final word is left to a System Board, the National Railroad Adjustment Board, or the Secretary of Labor and the three-man board set up under Section 3 First (f) of the Act—some, or all, or none of the possible considerations suggested above would be or might be relevant.

A statute, civil or criminal, in order to satisfy constitutional standards, must be sufficiently plain so that persons subject to it will be informed as to what conduct on their part will render them subject to its penalties, and what conduct will save them harmless. *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 235, 239 (1925); *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Winters* v. *New York*, 333 U. S. 507 (1948). *In State of Utah* v. *Packard*, 250 P. 2d 561, (November 1952), the Utah Supreme Court held unconstitutional a statute which provided that: "It is the duty of every person before commencing employment with any person, firm or corporation whose employees are out on labor strike called by a *national*

recognized union to register with the Industrial Commission of Utah" (Emphasis supplied).

The State, arguing that the underscored phrase was sufficiently definite to meet constitutional requirements, urged that it be interpreted as applying to "the larger unions—those which organize in whole industries on a nationwide scale, or extending over geographical areas crossing state lines." The Court pointed out, however, that the proposed definition did not resolve the problems of uncertainty:

> "The larger unions": larger than what? It would be as difficult to tell how big a union would have to be in order to qualify as a "larger union" as it would be to tell the width of a "narrow tired wagon" or how much frost in an orange would "endanger the reputation of the citrus industry". Certainly this comparative term furnishes no definite standard for determining which unions are referred to by the statute.
>
> "Which organize in whole industries": Obviously, unions cannot organize whole industries at one stroke; does the statute mean that no protection would be afforded during the process of development and organization, but the protective cloak of the statute would enshroud it only after the whole industry were organized? Again, would it be contended that a well known union would not be classified as a "nationally recognized union" if it were shown that substantial portions of a given industry were not yet organized by it?
>
> "On a nationwide scale or extending over geographical areas crossing state lines": The same questions recur. Does that mean every state in the union, or any state having any part of the industry in respect to which the union operates? How many states would the union have to be in, 2, 7, or 48? Exploration of this thought leads to the conclusion that it would be difficult, if not impossible, to tell on the basis of geographical distribution, whether a union would be classified as "a nationally recognized union", whatever that phrase may be thought to mean.

Nor can the vagueness of "national in scope" as used in Section 2 Eleventh be cured by reference to other portions of the Act. The only other provision which employs the term is Section 3. But Section 3 does not itself contain any definition of the phrase or erect any criteria or guides for ascertaining its meaning. Section 3 First (a) provides that half the members of the Adjustment Board shall be representatives of the railway labor organizations which are "national in scope". Section 3 First (c) provides merely that the labor organizations referred to in 3 First (a) shall prescribe the rules for the selection of their representatives. And Section 3 First (f) provides only that, in the event an organization asserts a right to participate in the selection of labor members of the Board and that right is disputed by the organizations already participating in such selection, the Secretary of Labor shall make a preliminary determination whether the claimant organization is "national in scope". If the Secretary's determination is that the claim has merit, the question of whether the claimant organization is "national in scope" is referred to and decided finally by a three-man board composed of one representative from the claimant organization, one from the resisting organizations, and a neutral designated by the National Mediation Board. Thus, Section 3 is as naked of definition or of criteria or standards for ascertaining the meaning of "national in scope" as is Section 2 Eleventh. In any event, as is urged below, in Point III, the procedure provided by Section 3 First (f) is fatally deficient.

In considering these problems, it is necessary to direct one's thinking to the position of the plaintiff at the time he was faced with the need for decision. He was confronted by the B. & O.—BLE agreement and the Railway Labor Act as amended by Section 2 Eleventh. These were his guides, and what they had to tell him were all he could

be expected to know, *in advance of his decision*, as to the standard of conduct required by him if he were to avoid the statutory sanction of discharge. See *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 463-65 (1927). It is submitted that the standard "national in scope" is so indefinite as to preclude any requirement that the individual employee must conform or suffer the loss of employment.

II

A CONSTRUCTION OF THE RAILWAY LABOR ACT WHICH WOULD REQUIRE PLAINTIFF, AFTER DISCHARGE, TO GO BEFORE THE NATIONAL RAILROAD ADJUSTMENT BOARD IN ORDER TO OBTAIN A DETERMINATION AS TO WHETHER U.R.O.C. IS "NATIONAL IN SCOPE" RESULTS IN AN UNCONSTITUTIONAL DELEGATION OF POWER TO THE BOARD AND DEPRIVES PLAINTIFF OF DUE PROCESS OF LAW.

The three-judge court ruled that it was without jurisdiction because plaintiff had not resorted to the administrative remedy available to him before the National Railroad Adjustment Board. Thus, even though Count II of the complaint alleged that the Union Shop Amendment was unconstitutional and that the supposed administrative remedy was itself constitutionally invalid, the opinion of the three-judge court would compel plaintiff to go to the Board.

1. Without regard to the procedures of the National Railroad Adjustment Board and without regard to the nature of that Board—i.e., whether it is a governmental or nongovernmental agency, or whether it be considered a judicial or quasi-judicial body—it is submitted that a construction of the Railway Labor Act which gives the Board authority to interpret and apply the statutory language results in an unconstitutional delegation of power to the Board because the phrase "national in scope" is so vague and uncertain of meaning, or susceptible of so many different meanings, as to be repugnant to the due process require-

ments of the Fifth Amendment. The delegation must fall because it is unaccompanied by any reasonably definite standards or criteria which would enable the agency receiving the delegation—the National Railroad Adjustment Board—intelligently to decide the meaning of the statutory phrase. See Point I *supra*.

2. The lack of standards and criteria aside, however, the delegation is improper because the Board, in carrying on its functions, does not adhere to procedures satisfying the fundamental requirements of due process of law. The Act is silent on the rules which shall govern the proceedings of the Board, and it prescribes none of the procedures traditionally considered to be essentials of due process. Nor has the silence of the Act been cured by the Board, for even the most cursory perusal of the Board's Rules establishes that no pretense has been made that hearings or other proceedings before the Board shall conform to due process standards. Cf. *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, 244 (App. D. C. 1941), affirmed by an equally divided Court, 319 U. S. 732 (1942).

Moreover, if the Act be construed to give the Board jurisdiction to interpret and apply the phrase "national in scope" and the Board decides that UROC does not fall within its ambit, the Board's decision is "final and binding" on the UROC member who takes his case to the Board. See Section 3 First (m) of the Act. For the only awards which the Act says are not "final and binding" are money awards, and only awards *in favor of a petitioner* before the Board may, under Section 3 First (p), be enforced in court. Thus, under the specific terms of the Act, if the plaintiff were to seek his remedy in the Adjustment Board, a Board award that UROC was not "national in scope" and that plaintiff's membership therein did not consitute compliance with the union shop agreement would be conclusive and not subject to court review.

3. Finally, the delegation to the National Railroad Adjustment Board of power to engage in the judicial function of construing the Act is invalid because of the nature of the Board itself.

The First Division of the Board—as is true of all four divisions of the Board—is composed of an equal number of representatives of railway labor organizations and of carriers. The Board members are chosen by and compensated by the respective labor organizations and carriers whose interests they represent.

The Board then, by virtue of its make-up and the method of selection of its members, is in no proper sense a governmental agency. And so some courts have said. *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, 276 (App. D. C. 1941) (Circuit Judge Stephens dissenting), affirmed by an equally divided Court, 319 U. S. 732 (1942); *Watson* v. *Missouri-Kansas-Texas R. Co. of Texas*, 173 S. W. 2d 357, 362 (Ct. Civ. App. Tex., 1943); *Dahlberg v. Pittsburgh & L. E. R. Co.*, 138 F. 2d 121, 122 (C. A. 3d 1943). Cf. the Administrative Procedure Act, 5 U. S. C. A. §§ 1001 et seq., Section 2(a) of which exempts "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them."

Section 1 of Article I and Section 1 of Article III of the United States Constitution bar the delegation of legislative or judicial powers to non-governmental groups. *Schechter* v. *United States*, 295 U. S. 495 (1935); *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1935). See also *Eubank* v. *Richmond*, 226 U. S. 137 (1912); *Washington ex rel. Seattle Trust Co., etc.* v. *Roberge, Superintendent of Building of Seattle*, 278 U. S. 116 (1928). Cf. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940).

Were the plaintiff compelled to resort to the Adjustment Board, he would be placing himself in the hands of an em-

ployer-employee group which, in part at least, would be partisan against him. UROC admits to membership employees in all five crafts of the operating end of the railroad industry, crafts which are represented respectively by the Brotherhood of Railroad Trainmen, the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Switchmen's Union of North America. Plainly, UROC is in organizational competition with these brotherhoods. Yet these are the five organizations which choose the five labor members of the First Division of the National Railroad Adjustment Board who would participate in the decision whether UROC is of such a character that membership therein constitutes compliance with union shop agreements held by these brotherhoods. Such a delegation to the Board would plainly be delegation "in its most obnoxious form"—delegation to "private persons whose interests may be and often are averse to the interests of others in the same business." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311 (1935).

III

THE RAILWAY LABOR ACT, IF CONSTRUED TO MEAN THAT CONGRESS HAS CONFERRED UPON THE SECRETARY OF LABOR AND A THREE MAN BOARD UNDER SECTION 3 FIRST (F) OF THE ACT THE POWER TO INTERPRET AND APPLY THE STATUTORY LANGUAGE "NATIONAL IN SCOPE" CONTAINED IN THE UNION SHOP AMENDMENT, INVOLVES AN UNCONSTITUTIONAL DELEGATION OF POWER TO THE SECRETARY AND THE BOARD AND DEPRIVES PLAINTIFF OF DUE PROCESS OF LAW.

Section 3 First (f) of the Act provides that an organization whose claim to participate in the selection of labor members of the Adjustment Board is disputed by other organizations already so participating, may apply to the Secretary of Labor for a preliminary determination as to whether its claim to participate has "merit". If the Secre-

tary so finds, the claim is referred for final determination to a three-man board consisting of a representative of the claimant organization, a representative of the resisting organizations, and a neutral person—essentially, an arbitrator—appointed by the National Mediation Board.

Parenthetically, it should be noted that an individual employee, such as the plaintiff, has no access at all to the procedures of Section 3 First (f). Only an organization can resort to them. But further, before an organization can make use of Section 3 First (f), there must be a "dispute" as to its right to participate in the selection of labor members of the National Railroad Adjustment Board. UROC has never sought to participate and consequently has never asserted a right to participate. As a result there is no "dispute" within the meaning of Section 3 First (f).

These considerations apart, however, a construction of the Act which would require plaintiff or plaintiff's organization, UROC, to follow the procedures of Section 3 First (f) would result in an unconstitutional delegation of power to the Secretary and the three-man board and a denial of due process of law, and for substantially the same reasons as have already been outlined in Point II, above with respect to a delegation to the National Railroad Adjustment Board.

1. Without regard to the procedures of the Secretary and three-man board, and without regard to the nature of that board—i. e., whether it is a governmental or non-governmental agency—such a delegation of power to interpret and apply the statutory language "national in scope" must fail because it is unaccompanied by any constitutionally definite standards or criteria to enable the agencies receiving the delegation intelligently to determine the meaning of the statutory phrase.

2. The lack of standards and criteria aside, however, such

a delgation would be improper because neither the Secretary nor the three-man board, in carrying on their functions, adheres to procedures satisfying the fundamental requirements of due process of law. The Act is silent on the rules which shall govern the proceedings of the Secretary and the board, and it prescribes none of the procedures traditionally considered to be essentials of due process. Nor has the silence of the Act been cured by the Secretary or any board. In fact no three-man board has been established to date, and no rules have been promulgated for any that might be established. The Act does not give either the Mediation Board or any other governmental agency the power to prescribe rules of procedure for such boards. Moreover, there is nothing in the Act to indicate whether the rules prescribed by one three-man board would be binding on any other three-man board.

3. Finally, the delegation to the three-man board of power to engage in the judicial function of construing and applying the Act is invalid because of the nature of the board itself.

IV

THE DISTRICT COURT ERRED IN RULING THAT THE PLAINTIFF HAD AN ADEQUATE REMEDY BEFORE THE NATIONAL RAILROAD ADJUSTMENT BOARD.

The three-judge court considered that the underlying dispute presented by plaintiff's complaint was cognizable by the National Railroad Adjustment Board, relying upon the *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 (1950), and *Slocum* v. *Delaware, L. & W. Ry. Co.*, 339 U. S. 239 (1950), line of authority. But these cases are not applicable, since here the basic dispute, apart from the constitutional questions raised in Count II, involves the meaning of the statutory language "national in scope"; consequently the problem is one of statutory construction and not

simply one of the interpretation or application of a collective bargaining agreement. Further, the underlying dispute is between the employee and the collective bargaining representative, not between the employee and the carrier. Finally, for the reasons given in Point II *supra,* the National Railroad Adjustment Board cannot provide an impartial forum for administrative relief. Consequently, as in *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192 (1944), there is no adequate administratve remedy, *even for the issues raised in the original complaint. It goes without saying that the direct constitutional attack on the Union Shop Amendment contained in Count II can only be heard and resolved by a court.*

The three-judge court also misconstrues Count II of the complaint, apparently believing that in attacking the constitutional validity of the National Railroad Adjustment Board and the Section 3 First (f) procedures plaintiff is merely anticipating jurisdictional defenses. Cf. *ILGWU* v. *Donnelly Garment Co.,* 304 U. S. 243 (1938). This view is plainly erroneous, however. Count II of the complaint attacks the constitutional validity of Section 2 Eleventh, of the Railway Labor Act on the ground that the language "national in scope" is fatally vague. This contention is advanced unequivocally, and regardless of whether the courts or some administrative agency be the tribunal empowered finally to interpret the language. Where Count II alleges that the make-up and procedures of the National Railroad Adjustment Board and of the three-man board provided for in Section 3 First (f) are themselves invalid, it does so in order to demonstrate that the Railway Labor Act does not provide anywhere criteria or standards for determining the meaning of "national in scope", and that the only administrative agencies which could conceivably attempt the statutory construction are themselves subject

to constitutional infirmities (See Complaint, Count II, par. 16-20).

For these reasons, the three-judge court's reliance upon *Aircraft & Diesel Equipment Co.* v. *Hirsch*, 331 U. S. 752 (1947) is misplaced. This Court there made it clear (p. 773) that constitutional questions "coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury", would make unnecessary resort to the supposed administrative remedy. Cf. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944).

Respectfully submitted,

EDWARD J. FRUCHTMAN,
RICHARD F. WATT,
Counsel for Appellant.

COTTON, FRUTCHMAN & WATT,
1943 Board of Trade Bldg.,
Chicago 4, Illinois,
Of Counsel.

APPENDIX "A"

Opinion and Orders

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 53-C-1927

BURTON C. JOHNS, SR., *Plaintiff*,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, *Defendant*,

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an Unincorporated Labor Organization, *Intervenor-Defendant*,

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an Unincorporated Labor Organization, *Intervenor-Defendant*

January 20, 1954

Before Lindley, Circuit Judge, La Buy and Hoffman, District Judges

LINDLEY, Circuit Judge:

Plaintiff brought this action to enjoin the enforcement of an order of defendant, Baltimore & Ohio Railroad Company, that plaintiff be discharged from its employ because of non-compliance with a union shop agreement between the Railroad and the intervening defendant Brotherhood of Locomotive Engineers, hereinafter referred to as the Engineers. In the original complaint, reference is made to some eight to ten respects in which the discharge order, and the interpretation of the union shop agreement implicity therein, are said to deprive plaintiff of his rights under the Railway Labor Act, 45 U. S. C. 151 et seq. In accord with its prayer, a temporary injunction was entered by Judge LaBuy restraining the Railroad from discharging plaintiff during the pendency of this suit.

By leave of court, an amendment to the complaint was filed, adding thereto, a second count, seeking to challenge the constitutionality of Section 2, Eleventh of the Act, 45 U. S. C. A. App. 152, Eleventh, on grounds to be noted infra, and invoking the jurisdiction of a three-judge court under the provisions of 28 U. S. C. 2282 to decide the constitutional question. Our inquiry concerns the second count only.

The Engineers moved to dismiss the amended complaint on the ground that, (1) plaintiff has not exhausted his administrative remedies, (2) the complaint does not state a cause for relief and, (3) the constitutional question raised is not sufficient to confer jurisdiction upon a three-judge court. The Brotherhood of Firemen and Enginemen, hereinafter referred to as the Firemen, intervenor-defendant by leave of court, answered challenging likewise the sufficiency of the complaint to raise a substantial constitutional question.

We find it necessary to consider only the jurisdictional question. The existence of a substantial constitutional question is a prerequisite to the jurisdiction of a statutory three-judge court. Ex parte Poresky, 290 U. S. 20; Otten v. Baltimore & O. R. Company, 205 F. 2d 58 (CA-2). In our opinion, no substantial constitutional question is raised by the amended complaint. From facts well pleaded, it appears that plaintiff is, and since 1918 has been, employed by the Railroad as an engineer. A union shop agreement was entered into between the Railroad and the Engineers effective November 1, 1951, which provided that every engineer employed was required within 60 days from that date to become a member of the contracting union unless he should become a member of, or hold a membership in, some other labor organization "national in scope," admitting to membership employees in engine service. As of November 1, 1951, and thereafter until April 1, 1953, plaintiff complied with this agreement by holding a membership in good standing in the Firemen, an organization qualified under the exception noted above. Prior to the latter date, on December 30, 1952, plaintiff became a member of United Railroad Operating Crafts, hereinafter referred to as UROC, and has maintained membership therein continuously since.

In accordance with the provisions of the agreement, and

prior to April 29, 1953, the Engineers notified the Railroad that plaintiff's employment should be terminated for his failure to comply with the union shop agreement, namely, by failing to maintain membership in a "national in scope" labor organization. On the date last mentioned, the Railroad notified plaintiff of this charge. Thereafter hearings were held before Railroad officials at which plaintiff was represented by counsel. On September 9, 1953, Mr. Frank J. Goebel, Vice President, Personnel, of the Railroad, found that plaintiff had not complied with the agreement by maintaining membership in any labor organization national in scope. In accord with this decision, the Railroad notified plaintiff that he would be discharged as of September 19, 1953. Thereafter, and prior to his discharge, plaintiff filed this action.

We suspend for the moment the summarization of the amended complaint. Prior to amendment of the Act of 1951, Subsection Fourth of Section 2, 45 U. S. C. 152, Fourth, insured the right of employees to bargain collectively, but granted to every employee the right to join a union as a condition for employment. By amendment, Subsection Eleventh was added to Section 2 of the Act in 1951. 45 U. S. C. A. App. 152, Eleventh. This subsection, sometimes herein referred to as the union shop amendment, permits carrier to enter into agreements with labor organizations qualified under the Act to represent railway employees, viz, "(a) to make agreements, requiring as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members" of the contracting labor organization, provided that this requirement be waived with respect to any employee not admissible to such membership on equal terms as those prevailing for members generally and those to whom membership is denied for any reason besides nonpayment of dues. Subsection (c) of the amendment provides that, with respect to operating employees, the condition for employment prescribed by any union shop agreement executed under the provisions of subsection (a) shall be satisfied "if the said employee shall hold or acquire membership in any one of the labor organizations, national in

scope, organized in accordance with this Chapter and admitting to membership employees of a craft or class in any of the said services [operating services] * * *."

After reciting the facts leading to this controversy, substantially as above stated, the amended complaint avers that plaintiff is an operating employee within the exception provided by subsection (c); that the amendment deprived plaintiff of the right theretofore conferred on him by Section 2, Fourth and Fifth, to join or refrain from joining any labor organization as he saw fit; and that he joined UROC in the good faith belief that it was a labor organization national in scope within the meaning of Section 2, Eleventh (c), and that, therefore, his membership in that organization constituted compliance with the union shop agreement.

The constitutional infirmity said to be revealed by these facts is that the union shop amendment is in violation of the Due Process Clause of the Fifth Amendment to the Constitution, in that the rights of employees to continued employment are made to depend on the phrase "national in scope" which is so vague that reasonably intelligent men can only guess at its meaning; that this infirmity is not cured by construing the phrase as it is used in Section 3 of the Act as a qualification for labor organizations entitled to participate in the selection of members of the National Railroad Adjustment Board (45 U. S. C. 153(a)), for it is averred that the phrase, as there used, is equally unconstitutional; that the provisions of Section 3, First (f) delegating to a three-man board convened by the Mediation Board the power to determine the meaning of the phrase are an unconstitutional delegation to private persons of legislative and judicial powers in violation of Article I, Section 1, Article III, Section 1 and the Due Process Clause of the Fifth Amendment of the Constitution of the United States; that, therefore, subsections Fourth and Fifth of Section 2 of the Act have never been validly amended; and that the union shop agreement between the Engineers and the Railroad, and plaintiff's threatened discharge are illegal as a violation of those provisions of the Act. In other words, he asserts a vested right in the continuation in force of sub-

sections Fourth and Fifth, although the precise basis for this claim is not entirely clear. He prays for a declaratory judgment that the union shop amendment to the Act is unconstitutional as depriving him of due process of law, that the union shop agreement executed thereunder is invalid and that plaintiff can not be lawfully discharged for noncompliance therewith.

Jurisdiction is challenged by the intervening defendants on the ground that the complaint reveals that no constitutional rights of plaintiff have been violated. It is said that he acquired no vested rights under Section 2, Fourth and Fifth, which could not be abrogated by subsequent legislation; that the crux of the controversy is the interpretation of and application of the union shop agreement, a subject delegated by the Act exclusively to the jurisdiction of the Railroad Adjustment Board, hereinafter sometimes referred to as the Board (45 U. S. C. 153, First), and that the question whether UROC is a labor organization national in scope is committed exclusively to a three-man board to be appointed by the National Mediation Board after prescribed procedures before the Secretary of Labor (45 U. S. C. 153, First (f)); that, therefore, plaintiff has not exhausted his administrative remedies and the constitutional question is not ripe for decision; that no substantial constitutional question is presented, inasmuch as the facts well pleaded in his complaint amount to an attack on the union shop agreement, not on the statute; and that the purported attack on the statute is a mere form of words, without substance, adopted by plaintiff in order to invoke the jurisdiction of a three-judge court.

An analysis of the position which plaintiff is forced to assume in order to attempt to raise the constitutional question reveals that defendants' contentions are meritorious. Section 3 of the Act, 45 U. S. C. 153, created the National Railroad Adjustment Board, composed of members selected by the carriers and nationally recognized unions. This Board is given power on petition of either party to a labor dispute between an employee and a railroad to decide the dispute and make awards, including back pay awards enforcible by process in the district courts. The case at bar

is one of a great number of similar cases now pending, or decided within the past year, prosecuted by UROC or its members to contest the discharge of its members for non-compliance with union shop agreements. In all of these reported cases, with one exception, the courts have held that this issue is a dispute, within the meaning of Section 3 First (1), cognizable by the Board, and that the courts are without jurisdiction. UROC v. Northern P. R. Co. (CA-9), decided November 6, 1953; UROC v. Wyer, 115 F. Supp. 359 affirmed mem. 205 F. 2d 153 (CA-2), petition for certiorari pending; Pigott v. Detroit, T. & I. R. R. Co., E. D. Mich., November 10, 1953; Lake v. Baltimore & O. R. Co., S. D. Ohio, March 9, 1953. In UROC v. Pennsylvania R. Co., decided June 29, 1953 the District Court held that the question whether UROC is a union national in scope is a question for the court. It found that UROC was not national in scope and dismissed the complaint for want of equity. An appeal is now pending in the United States Court of Appeals for the Seventh Circuit. Furthermore the Adjustment Board had docketed a proceeding involving a similar dispute, Brotherhood of Locomotive Fireman and Enginemen v. Chicago, B. & Q. R. Co., 1st Div. Docket 3074, and a special Adjustment Board, convened pursuant to the provisions of a union shop agreement, as authorized by Section 3, Second, of the Act has taken jurisdiction to decide a similar dispute. H. J. Stelmack, Baltimore, July 8, 1952. See also, Otten v. Baltimore & O. R. Co., 205 F. 2d 58 (CA-2), in which case a non-operating railroad employee, professing religious scruples against joining a labor union, sought to convene a three-judge court to determine the constitutionality of subsection (a) of the union shop amendment. The court held, that in the absence of accrued vested rights under Section 152, Fourth and Fifth, which could not be abrogated by amending the statute, no substantial constitutional question was stated requiring the convening of a three-judge court.

To circumvent these authorities, plaintiff is forced to anticipate the jurisdictional defenses now urged and attempts to show that, as applied to him, no adequate remedy is afforded him by resort to the Adjustment Board. It is said that the issue presented is not a question arising in a

labor dispute growing out of the contract, but a question of statutory interpretation which is beyond the jurisdiction of the Board; that the Board is composed, in part, of members selected by labor organizations hostile to plaintiff's claim; that the statute affords no redress to the courts to review an award of the Board adverse to an employee; and, that, therefore, he would be denied a fair hearing before that body. It is further contended that, if this controversy is found to arise out of a labor dispute, the Board is incompetent to act thereon, on the ground that it is an unconstitutional delegatee of legislative and judicial power.

It is apparent that each of the contentions requires the anticipation of issues which will arise, if at all, only after plaintiff has applied to the Board for relief and its award has been entered. Thus plaintiff states a theoretical grievance, not one based on fact. The facts stated, if valid for any purpose, merely militate against the interpretation and enforcement of the union shop agreement.

In International Ladies' Garment Workers Union v. Donnelly Garment Co., 304 U. S. 243, the Supreme Court held similar averments to be without merit, as a basis for convening a three-judge court. Donnelly brought a suit seeking to enjoin the Union, its officers and agents from committing certain acts (picketing, boycotting, etc.) alleged to be in furtherance of a conspiracy in violation of the Sherman Anti-trust Act and the Clayton Act. A second union, intervening as a plaintiff, averred that the acts complained of did not grow out of a labor dispute within the meaning of the Norris-LaGuardia and National Labor Relations Acts, and that those statutes would be unconstitutional if interpreted to require a different conclusion. The court said at 251: "The contention of plaintiffs that the Norris-LaGuardia Act was not applicable to the conduct of defendants and would be invalid if otherwise interpreted was but an anticipation of a defense and did not constitute an application for injunction in any proper sense of the terms as used in Section 3. The only application for an injunction was one to restrain the defendants from committing acts in pursuance of the alleged conspiracy . . . The statute did not require a decision by three judges upon that application or authorize a direct appeal to this court." The

pertinency of this language to the case at bar is readily apparent.

Furthermore, the existence of the administrative remedy in this case more clearly impels us to hold that no cause is presented for consideration by three judges. That the remedy afforded to an aggrieved employer by Section 3 of the Act must be exhausted before resort is had to the courts has been reiterated in numerous decisions applying the Act. Of the aim of Congress in creating the Adjustment Board, the court said in Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 728, "It [the aim] was to add decision where agreement fails and thus to safeguard the public as well as private interests against the harmful effects of the preexisting scheme." Again, in Order of Railway Conductors v. Pitney, 329 U. S. 520, 567, the court said, "The factual question (in interpretation of a bargaining agreement) is intricate and technical. An agency especially competent . . . to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then. The reasoning in the Pitney Case said in Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 244, to require "a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." See also, Transcontinental Air & Kappal, 345 U. S. 653, 660-662; Missouri-K-T-R Co. v. Brotherhood of Ry. & S. S. Clerks, 188 F. 2d 302 (CA-7); Colbert v. Brotherhood of Railroad Train, 206 F. 2d 9 (CA-9); UROC Cases cited supra. Although the constitutionality of the Board or of its processes was not challenged in any of these cases, in view of the many court decisions which, in many cases, enhance the stature of the Board, we should scrutinize closely any contention of its unconstitutionality. This instant controversy is a dispute cognizable by the Board, and that should put an end to the jurisdiction of this court until plaintiff has there sought his remedy.

The fact that an attack is made on the validity of the Administrative body itself does not obviate the necessity of first following to a conclusion the allegedly unconstitu-

tional administrative process, Aircraft & Diesel Equipment Co. v. Hirsch, 331 U. S. 572. In this respect the court said, at 767, "[T]he courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner." Again at 772, the court said, "On the contrary, whatever may be true of other situations, in this case the very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of the Tax Court's final performance of its function. When that has been done, it is possible that nothing will be left of appellant's claim,—concerning which it will have basis for complaint." The latter language is significantly applicable to the case at bar. As in the Hirsch case, plaintiff asserts claims other than those of unconstitutionality which might have disposed of its cause without presenting the constitutional issue.

The burden on plaintiff, under Section 2282, to survive the initial scrutiny of the assembled three-judge court relative to its jurisdiction, is to state facts to show that the constitutional question is squarely presented and must be determined that his cause is, in fact, one to restrain the enforcement of a federal statute. This he can not do until he exhausts his administrative remedy. This is doubly true in this case, wherein a different decision would require the court to impugn, as plaintiff seems to do, the integrity of the Adjustment Board, by presuming that it will act other than fairly and within its statutory and constitutional standards of procedure.

We conclude, therefore, that no substantial constitutional question is presented requiring the action of three judges, and this court should refrain from further action. See 14 Cyclopedia of Federal Procedure (3rd Ed.) Section 73.105, and cases there cited.

The three-judge court is dissolved and the cause returned to Judge LaBuy for further proceedings.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Cause No.: 53 C 1927

Present: Honorable Walter C. Lindley, Circuit Judge; Honorable Walter J. La Buy, District Judge; Honorable Julius J. Hoffman, District Judge.

BURTON C. JOHNS, SR.

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, ET. AL.

Order

Upon due consideration, the Court being fully advised in the premises and having this day filed its Memorandum Opinion herein it is

Ordered pursuant to said Memorandum Opinion that the Three Judge Court be and the same hereby is dissolved and that this cause be and the same hereby is returned to the Honorable Walter J. La Buy, Judge of this Court, for further proceedings.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said Court on the 20th day of January A. D. 1954 as fully as the same appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Chicago, in said District, this 8th day of February, A. D. 1954.

ROY H. JOHNSON,
Clerk.

By: GIZELLA BUTCHER,
Deputy Clerk.

(SEAL)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Cause No.: 53 C 1927

Present: Honorable Walter J. La Buy, District Judge.

BURTON C. JOHNS, SR.

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated labor organization and BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated labor organization, *Intervening Defendants*

Order

This cause having been returned to this Court, upon due consideration the Court being fully advised, it is

Ordered that the preliminary injunction heretofore entered herein be and the same hereby is dissolved and it is

Further ordered that this cause be and the same hereby is dismissed for lack of jurisdiction.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said Court on the 20th day of January A. D. 1954 as fully as the same appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Chicago, in said District, this 8th day of February, A. D. 1954.

ROY H. JOHNSON,
Clerk.

By: GIZELLA BUTCHER,
Deputy Clerk.

(SEAL)

19

MAR 8 1954
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 625

BURTON C. JOHNS, SR.,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT OF APPELLEE, THE BALTIMORE & OHIO RAILROAD, IN SUPPORT OF APPELLANT'S STATEMENT AS TO JURISDICTION.

E. H. BURGESS,
E. W. LADEMANN,
S. R. PRINCE, JR.,
Counsel for Appellee,
The Baltimore and Ohio
Railroad Company.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 53-C-1927

BURTON C. JOHNS, SR.,
Plaintiff-Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY,
A CORPORATION,
Defendant-Appellee;
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
AN UNINCORPORATED LABOR ORGANIZATION,
Intervenor-Defendant-Appellee;
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCORPORATED LABOR ORGANIZATION,
Intervenor-Defendant-Appellee

STATEMENT OF APPELLEE, THE BALTIMORE AND OHIO RAILROAD COMPANY, TO THE SUPREME COURT OF THE UNITED STATES, IN SUPPORT OF APPELLANT'S STATEMENT AS TO JURISDICTION.

Appellee, The Baltimore and Ohio Railroad Company (hereafter referred to as the "B. & O."), does not oppose the appeal application for a review of the judgment of the District Court entered in this cause. Believing that the issues should be judicially determined, without a concurrent denial of jurisdiction, B. & O. supports the application.

I

Statement of Issues on Appeal

Appellant has been employed by B. & O. as a fireman and an engineer since 1918, thereby acquiring a property right to continued employment in said crafts in accordance with rules of the respective collective agreements. For a while after the execution of the union shop agreement on October 15, 1951, he was a member of the Brotherhood of Locomotive Firemen and Enginemen (a labor organization whose claimed status as "national in scope" has not been challenged). Appellant dropped that membership about April 1, 1953 and joined the United Railroad Operating Crafts Organization (U. R. O. C.). The representative of the engineers craft on the B. & O. is the Brotherhood of Locomotive Engineers (hereafter, the "B. L. E."). B. L. E. does not recognize U. R. O. C. as a labor organization "national in scope" within the meaning of that phrase in Section 2, paragraph Eleventh (c) of the Railway Labor Act (45 U. S. C. Sec. 152, Eleventh, subparagraph (c)). In pertinent part that section provides that a railroad employee can not be required by a union shop agreement to become a member of the labor organization representing the craft (the contracting party to the union shop agreement)" . . . if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; . . ." The "services" spoken of are the socalled "operating crafts" and this includes engineers. Soon after appellant ceased to be a member of the Brotherhood of Locomotive Firemen and Enginemen, the B. L. E. notified B. & O. that appellant did not have requisite membership under its union shop agreement with B. & O. After hearings and an

appeal, determined by Frank J. Goebel, its Vice President—Personnel, B. & O. decided that appellant was not in compliance with the union shop agreement and notified him on September 9, 1953 that his employment relationship would be terminated on September 19, 1953. Having no further appeal under the terms of the union shop agreement, appellant brought this action for an injunction against discharge, relying upon asserted statutory rights which he claims B. & O. failed to recognize. By amendment appellant added "Count II" to the complaint and in it he contends that the determination of the questions about the meaning of the Union Shop Amendment by the National Railroad Adjustment Board would deny him due process, and be unconstitutional in other respects also. The court proceedings are related in the "Statement As To Jurisdiction"; suffice it to say further that appellant was not discharged until after January 20, 1954 when the District Court dissolved the preliminary injunction and dismissed the cause, as it was advised to do in the opinion of the three judges. The opinion of the three-judge court and the orders entered pursuant thereto, which appear as Appendix A with the "Statement As To Jurisdiction", decide questions important in the application and administration of the 1951 Union Shop Amendment to the Railway Labor Act (45 U. S. C. Sec. 152 Eleventh). The District Court denied its own jurisdiction, incidentally renouncing all judicial cognizance of controversies of this character, and it referred appellant to the National Railroad Adjustment Board. That decision is erroneous.

In Count II of the complaint appellant contended fundamentally that Section 2 Eleventh of the Railway Labor Act violates the due process clause of the Fifth Amendment to the Constitution of the United States because the rights of operating employees are made to depend upon the meaning of the phrase "national in scope", which is so vague that

reasonably intelligent men can only guess at its meaning (No. 4, Assignment of Errors). Appellant also contended that in the absence of any commonly understood meaning of the phrase "national in scope" and of any statutory definition or criteria or standards for determining its meaning, the attempted delegation of the determination of the question by Section 3 First (f) to an administrative officer (the Secretary of Labor) and a private three-man board is in violation of Article I, Section 1, Article III, Section 1, and the due process clause of the Fifth Amendment (complaint, Count II, par. 20, subparagraph "h").

Those questions are not frivolous; obviously they present serious constitutional issues which merit full and direct consideration of the Federal Courts unaccompanied by a denial of jurisdiction on an extrinsic basis. At the outset B. & O. welcomed the prospect of judicial determination of the questions in the belief that the judgment would bind appellant in any other later proceedings and also the labor organizations.

Because B. L. E. is the representative of the engineers' craft and is a party to the union shop agreement, B. & O. supported its intervention as a defendant, although apprised of B. L. E.'s intention to challenge the jurisdiction of the Court.

B. L. E. objected to any determination by the Court of the statutory and the constitutional questions on the ground that the National Railroad Adjustment Board had exclusive jurisdiction. The District Court so decided; as already stated, B. & O. believes that decision is erroneous.

II

The Jurisdiction of the District Court Over the Sort of Matters in Controversy Is Well Founded

Appellant correctly states that this action arises under the Railway Labor Act as amended, 45 U. S. C. A. Sec. 151

et seq., an Act regulating interstate commerce, and bases the jurisdiction of the District Court on Section 1337, Title 28 U. S. C. A. *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210, supports appellant. As appellant relies upon statutory and constitutional rights, not upon rights arising simply in the terms of the collective bargaining agreement, it is clearly distinguishable from *Hayes* v. *Union Pac. R. Co.*, 88 F. Supp. 108, affirmed 184 F. 2d 337, cert. den. 340 U. S. 942. It is true that the pertinent language of the Union Shop Amendment, quoted above, is used in the union shop agreement without any significant change, but that does not operate to deprive the federal district courts of jurisdiction under Section 1337—to hold otherwise would mean that two parties (B. & O. and B. L. E.) had by agreement restricted the jurisdiction of those courts to the prejudice of an employee who contends that his statutory rights can not be impaired through collective bargaining. In other words, a direct attempt by his bargaining representative to deprive appellant of his statutory and constitutional rights through either the terms of or interpretation given to a collective agreement would authorize injunctive relief. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192. Plainly the authority of a collective bargaining representative does not extend to the making of rules to deprive a member of the craft of statutory rights.

Appellant relies upon paragraph Fourth of Section 2 of the Railway Labor Act contending that the unconstitutionality of paragraph Eleventh (the Union Shop Amendment) leaves it in full force and effect. (Complaint, Count II, par. 15.) Paragraph Fourth of Section 2 makes it unlawful for any carrier to "influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization." The Court in 1930 affirmed an injunction brought to vindicate closely related rights under the same paragraph of the Railway

Labor Act. *Texas & N. O. R. Co.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548. The Court said at page 568:

> "While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded."

The Court could in effect have been speaking of the provision in subparagraph (c) of the Union Shop Amendment; *i. e.,* that the requirement of membership "shall be satisfied" if the employee acquires membership in a labor organization "national in scope", when it said in the *Clerks* case, *supra:*

> "The absence of a penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties."

III

Objections to the Jurisdiction of the United States District Court Are Based upon an Inapplicable Exception

B. L. E. has insisted erroneously that the National Railroad Adjustment Board has exclusive jurisdiction. In short, it relies upon a supposed supervening exception to the jurisdiction of the federal district courts. In *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630, a discharged railroad employee brought suit for common law damages for breach of his employment contract without resorting to the Adjustment Board. The Illinois Central contended unsuccessfully that the suit was prematurely brought on account of his failure to exhaust his administrative remedies. Illinois

Central relied upon Section 3 First (i) of the Railway Labor Act which provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The following comment of the Court is peculiarly pertinent. It said at page 635:

> "It is to be noted that the section pointed out, Sec. 153(i), as amended in 1934, provides no more than that disputes 'may be referred . . . to the . . . Adjustment Board. . . .' It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party . . .' This difference in language, substituting 'may' for 'shall', was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose."

The Court concluded with a finding that the discharged employee was not required by the Act "to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge."

Of course, the *Moore* case did not itself create the exception; the exception to all court jurisdiction in favor of the

exclusive jurisdiction of the Adjustment Board was recognized in a comment on the *Moore* case which we find in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239.

In the *Slocum* case the railroad was faced with claims by rival crafts, each under its own collective agreement, to the same jobs. Without resorting to the Adjustment Board it sought to determine the meaning of those collective agreements by declaratory judgment. The Court said at page 242:

> "In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties."

The Court accordingly reversed the Court of Appeals of New York on the ground that the Adjustment Board had exclusive jurisdiction. The issues in this case are not the same at all. It is by no means established that rights specified in the same language first in a statute and later in a collective agreement can be enforced only before the Adjustment Board. It is true that both past and future relations of railroad operating employees will be seriously affected by the interpretation of the statutory language, but that surely does not mean that Congress intended the Adjustment Board to have exclusive primary jurisdiction of either interpretation or enforcement.

This Court said in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, at p. 566, that a court of equity could in a proper case intervene to protect the interests of individuals if the case involved a sacrifice of a right which Congress had created. The appellant claims such rights as well as rights created by the Constitution of the United States. *Steele* v. *L. & N. R. Co., supra.*

IV

Appellant's Objections That the Adjustment Board Remedy Is Inadequate Are Well Taken

Appellant's case would be within the purview of the First Division, Section 3 First (h) of the Railway Labor Act. It consists of ten members, five of whom are selected by the carriers. The other five are selected by the following five organizations:

(1) Brotherhood of Locomotive Engineers.
(2) Brotherhood of Locomotive Firemen and Enginemen.
(3) Brotherhood of Railroad Trainmen.
(4) Order of Railway Conductors.
(5) Switchmen's Union of North America.
(Complaint, Count II, par. 20(h).)

These ten members privately appointed and compensated are not Government officials, much less judges. Section 3, First (b) and (c). With one or two exceptions they are laymen, not lawyers. They take no oath of office. The Railway Labor Act does not specify how they will decide any dispute, except Section 3 First (m) requires that their Awards shall be stated in writing. Any six of them are sufficient to make an Award, Section 3, First (n). Their "expertise" is confined to the ordinary provisions of railroad collective agreements, *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 567, and it does not extend to statutory and constitutional interpretation. The "carrier members" and the "labor members" are frankly partisans. The Report of the Committee on Administrative Procedure entitled "Administrative Procedure in Government Agencies", 77th Congress 1st Session, Senate Document No. 8, makes the following comment at page 185 in regard to the composition of the Board:

> "Some procedural difficulties of the National Railroad Adjustment Board stem from the fact that its

members are essentially representatives of the litigants before it, rather than impartial arbiters of the controversies presented for decision. The creation of a disinterested tribunal to replace the present organization might, therefore, resolve certain existing procedural problems. It is clear, however, that the bipartisan character of the Board—half of whose members represent carriers and half of whom represent employees organizations—is a reflection of historical developments and that, with all of its imperfections, it may make for a more workable adjudicatory mechanism than could a plan constructed abstractly."

U. R. O. C. is directly competitive in railroad employees representation with the five labor organizations which selected the five "labor members." There is no reason to suppose that the interest of any of the five "carrier members" will coincide with that of appellant and those like him in circumstances. If appellant had gone to the First Division, instead of the Court, his discharge would have become effective September 19, 1953—this is so because the First Division does not issue any interlocutory Awards or orders; its rules provide for none and it may be strongly doubted that it possesses any such authority under the Act. Though the First Division accords priority on its calendar to cases of discharge, it is far behind in its docket. Eighteenth Annual Report of National Mediation Board, p. 18. A number of months would have elapsed before that Division could have reached appellant's case. This would mean that the "carrier members", appointed by B. & O. and other railroads jointly, if they favored appellant's case, would be advocating the imposition of a back-pay penalty upon B. & O. The circumstances considered, with no duty to appellant, and with the dicta of several Federal Courts against his position, it is not hard to imagine how the votes of the "carrier members" would be cast.

The First Division in Award No. 16475, a case involving the Chicago, Burlington & Quincy R. R. Co., has already passed adversely upon a claim involving another U. R. O. C. member. The Award held that the employee had not proved U. R. O. C. to be "national in scope". The opinion (*i. e.*, the "Findings") in part stated:

> "So far as we are advised, there has been no final interpretation of the meaning of the words 'national in scope', as used in amendments to the Railway Labor Act, *by any tribunal of competent jurisdiction.*" (Italics added.)

That Award resulted from the railroad company's refusal to remove Fireman Milton P. Hanson from service under the union shop agreement; therefore, the Brotherhood of Locomotive Enginemen and Firemen was "petitioner" to the First Division rather than the employee or U. R. O. C. Petitioner made claim for his removal and the claim was sustained.

V

B. & O. Has a Vital Interest in Obtaining a Decision of These Issues by a Court Having Acknowledged Jurisdiction.

The first *E., J., & E.* case, entitled *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U. S. 711, has a bearing upon the question. There members of a craft were allowed to sue upon certain claims based upon the socalled "starting time" provisions of their collective agreement despite an adverse Award by the First Division. The reason was that the labor organization had not shown the requisite authorization to act as "petitioner" in presenting the case on which the Award was made. Considering that all ten regular members of the First Division also act as "representatives of the litigants" (certainly without any authority from ap-

pellant to "represent" him) B. & O. could hardly rely upon an Adjustment Board Award adverse to appellant if the matter later reached a court in a suit for common law damages for breach of the employment contract. Such an action could very possibly be maintained in view of the fact that appellant would not have any right to appeal an adverse Award of the Adjustment Board. Section 3 First (m) and (p) of the Act.

VI

Appellant Has No Adequate Remedy by Action for Damages under Doctrine of the Moore Case for Reason Stated Below.

It therefore seems possible that under the *Moore* case, *supra,* as explained in the *Slocum* case, *supra,* appellant might still bring the same issues of statutory interpretation and constitutional validity before a court in an action for wrongful discharge. In the *Slocum* case the Court said at page 244:

> "Our holding here is not inconsistent with our holding in *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

In the application of both the *Moore* case and the *Slocum* case no one seems to have noticed that Section 5 (e) of the union shop agreement (Exhibit A with the original complaint) provides:

> "Provisions of discipline rules contained in rules and working conditions agreements between the Carriers and the Brotherhood will not apply to cases arising under this agreement."

The fact that appellant might be able to maintain an action for common law damages for breach of his employment contract is not to say that such a suit would be an adequate remedy in itself. At least he would be obliged to waive his contract right to future employment by B. & O. as an engineer. But an even more serious problem would then confront him. It is only by virtue of the provisions of the "discipline rule" that a railroad employee is considered to have an indefinite tenure of employment, as distinguished from an employment-at-will. Since the discipline rule has been made expressly inapplicable by Section 5 (e) of the union shop agreement, appellant would be in the position of the employee in *Rolfes* v. *Dwellingham*, 198 F. 2d 591. There a waiter-in-charge who was only an employee-at-will was successful in enjoying his displacement, it being observed that he had no cause of action for damages for loss of employment.

The particular discipline rule, otherwise applicable to appellant, which has been set aside by Section 5 (e) of the union shop agreement is Rule 25 (f) of the collective agreement filed with the Mediation Board pursuant to the requirement of Section 5 Third (e) of the Railway Labor Act. The agreement is entitled: "Agreement Between The Baltimore and Ohio Railroad Company and the Brotherhood of Locomotive Engineers (in the territory of the former Buffalo, Rochester, and Pittsburgh Railway)—Rules

Effective January 1, 1949." Rule 25(f) of that agreement provides as follows:

> "If it is found the engineer has been unjustly suspended or dismissed from the service, such engineer shall be reinstated with his seniority rights unimpaired and compensated for the wage loss, if any, resulting from such suspension or dismissal, provided, however, that any earnings made in other employment during time out of service shall be deducted from such wage loss. For the purposes of this rule self-employment will not be considered as other employment."

Conclusion

B. & O. submits that appellant has raised substantial constitutional questions. B. & O. stands in jeopardy of conflicting decisions; first, an Award by the Adjustment Board finally depriving appellant of the possibility of re-instatement, and, second, a judgment of wrongful discharge—both depending on the same words appearing in both the statute and the agreement, words which were intended by B. & O. and B. L. E. to have the same meaning. The very purpose of using the statutory words in the union shop agreement was to preserve such meaning as they had.

B. & O. prays this Court to hear this case, establish that jurisdiction lay in the District Court, and decide the issues.

E. H. Burgess,
E. W. Lademann,
S. R. Prince, Jr.,
Counsel for Appellee,
The Baltimore and Ohio
Railroad Company.

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APR 8 19
HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 625

BURTON C. JOHNS, SR., *Appellant*,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT OF BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN OPPOSING JURISDICTION AND MOTION TO DISMISS.

BURKE WILLIAMSON,
HAROLD C. HEISS,
RUSSELL B. DAY,
Counsel for Appellee Brotherhood of Locomotive Firemen and Enginemen.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 625

BURTON C. JOHNS, SR., *Appellant*,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCORPORATED ASSOCIATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

STATEMENT BY APPELLEE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN OF GROUNDS OF OPPOSITION TO APPELLATE JURISDICTION OF ABOVE COURT, PURSUANT TO SUPREME COURT RULE 12.

Introduction

The Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, Intervenor-Defendant

below, and an Appellee in the appeal to the Supreme Court of the United States, herewith presents its statement disclosing any matter or ground making against the jurisdiction of this Court asserted by Burton C. Johns, Sr., Plaintiff, and Appellant in the appeal to this Court, pursuant to the provisions of paragraph 3 of Rule 12 of this Court.

There is included in this opposing statement a motion by this Appellee to dismiss this appeal.

Statement of Facts

Complaint

The Complaint alleges that the action arises under the Railway Labor Act, as amended, Title 45, U.S.C. Sec. 151 and following.

The Plaintiff is an employee of the Defendant The Baltimore and Ohio Railroad Company engaged in its engine service.

Section 2 Eleventh of the Railway Labor Act authorizes carriers and labor organizations which represent employees to enter into union shop agreements; provided, however, that as to employees in engine service the requirement of membership in a labor organization shall be satisfied if the employee is a member of "one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services;".

The Plaintiff is a member of the United Railroad Operating Crafts, a railway labor organization, organized in accordance with the Railway Labor Act, said to be "national in scope", and admitting to membership railroad employees in engine service.

The Railroad and the Brotherhood of Locomotive Engineers, representative of engineers on the Railroad, entered into a union shop agreement which provided that the re-

quirements of membership contained in the agreement shall be satisfied if any employee shall be a member of one of the labor organizations, other than the Brotherhood of Locomotive Engineers, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of any craft or class in engine service.

On the complaint of the Brotherhood of Locomotive Engineers that the Plaintiff was not a member of a labor organization national in scope, hearings were had by the Railroad, which decided that "he did not hold nor had not acquired membership in the Brotherhood of Locomotive Engineers, nor in any one of the labor organizations, other than the Brotherhood of Locomotive Engineers, national in scope, organized in accordance with the Railway Labor Act, and that his employment would be terminated."

The Complaint prayed for a temporary and permanent injunction restraining the Railroad from discharging the Plaintiff and for a declaratory judgment that United Railroad Operating Crafts is, "within the meaning of Section 2 Eleventh of the Railway Act, Title 45, U.S.C.A. Sec. 152, Eleventh, a railway labor organization, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of crafts and classes in the engine, train, yard or hostling services."

Amendment to Complaint

The Amendment to Complaint is entitled "Count II: for Declaratory and Injunctive Relief and for Convening of Three-Judge Court." In general, the allegations of Count II follow those of the original Complaint, with these exceptions:

> Count II does *not* declare that the United Railroad Operating Crafts is "national in scope";
> The phrase "national in scope" is said to be vague and indefinite;

The National Railroad Adjustment Board is alleged to be unable constitutionally to define "national in scope"; and

The Secretary of Labor and a three-man board convened by the National Mediation Board are alleged to be unable constitutionally to determine the meaning of "national in scope".

Count II prays for a declaratory judgment that the Union Shop Amendment to the Railway Labor Act is unconstitutional as being in violation of the due process clause of the Fifth Amendment to the United States Constitution for the reason that rights given to employees by subparagraph (c) of the Union Shop Amendment are made to depend upon a phrase, "national in scope", the meaning of which is vague and indefinite. The Plaintiff further prays for an order declaring the union shop agreement invalid and for a temporary and permanent injunction against the discharge of the Plaintiff for alleged noncompliance with the agreement.

Count II also requests that a three-judge court be convened inasmuch as Plaintiff is asking that the enforcement and operation of an Act of Congress be restrained for repugnance to the Constitution of the United States.

Orders Appealed From

A three-judge court was convened as requested by the Plaintiff, and arguments of the parties were heard and considered. Thereafter that Court filed its Memorandum Opinion, which concluded that no substantial constitutional question is presented requiring the action of three judges, that the court should refrain from further action, and that the three-judge court is dissolved and the cause returned to the single judge for further proceedings. The Order entered by the three-judge court was as follows:

"ORDERED pursuant to said Memorandum Opinion that the Three Judge Court be and the same hereby

is dissolved and that this cause be and the same hereby is returned to the Honorable Walter J. LaBuy, Judge of this Court, for further proceedings."

Judge LaBuy, as a single judge, thereupon entered the following Order:

"This cause having been returned to this Court, upon due consideration the Court being fully advised, it is

Ordered that the preliminary injunction heretofore entered herein be and the same hereby is dissolved and it is

Further ordered that this cause be and the same hereby is dismissed for lack of jurisdiction."

The Plaintiff, as Appellant, has appealed to the Supreme Court from *both* of said Orders.

ARGUMENT

Statute under Which Appeal Is Taken

The Appellant declares, at page 9 of his Statement as to Jurisdiction:

"The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253."

This Section reads as follows:

"*Direct appeals from decisions of three-judge courts*

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

It will be observed that, so far as applicable to this case, to give jurisdiction to this Court the appeal must include two factors:

1. The appeal must be from an order denying an injunction; and
2. The order denying an injunction must be in a suit required by an Act of Congress to be heard and determined by a district court of three judges, which, in this instance, means a suit for an injunction against enforcement of a Federal statute required by Section 2282 of the Judicial Code to be heard and determined by a three-judge court.

This Appellee believes that the present appeal fails to meet either of the two conditions necessary to give jurisdiction to this Court and that this appeal therefore must be dismissed.

I

The Appeal Is Not from an Order Denying an Injunction

The first Order appealed from is that of the three-judge court dissolving itself and returning the cause to Judge LaBuy for further proceedings.

Certainly, on its face, this is not an order denying an injunction. It is true that the Appellant asked the three-judge court to grant him an injunction and, perhaps, the Appellant's theory is that the failure of the three-judge court to give him the requested relief constitutes an order denying an injunction.

In considering this question, we may assume three situations:

First, the single judge to whom the case is assigned refuses the Plaintiff's request to convene a three-judge court. Here the Plaintiff's remedy is not an appeal to this Court, but an application for a writ of mandamus for the convening of the three-judge court (*Ex*

parte Bransford, 310 U. S. 354, 355, 84 L. ed. 1249, 1250, 60 S. Ct. 947) or, when the single judge denies the injunction application, an appeal to the Court of Appeals (*Otten v. Baltimore & O. R. Co.*, 2nd Cir. 205 F. 2d 58).

Second, the single judge to whom the case is assigned grants the Plaintiff's request to convene a three-judge court but that court, after hearing the parties, concludes that no substantial constitutional question is presented requiring the action of three judges, dissolves itself, and returns the cause to the single judge. (This is our case.) Here, again, the Plaintiff's remedy is not an appeal to this Court, but an application for a writ of mandamus for the convening of the three-judge court. This was the procedure followed in *Ex Parte Public Nat. Bank*, 278 U. S. 101, 73 L. ed. 202, 49 S. Ct. 43, in which this Court said at pages 101-103 of the official report:

". . . A statutory court of three judges was constituted under § 266 of the Judicial Code (U. S. C. title 28, § 380), and a master appointed, by whom evidence was taken and reported. When the case came on for final hearing, the court, of its own motion, dissolved after directing that the cause proceed before a single district judge upon the ground that the suit was not one coming within the terms of § 266. Petitioner applied to this court for a writ of mandamus requiring the judges composing the statutory court to reconvene and proceed to a determination of the case. Upon filing the petition, a rule to show cause was issued, upon a return to which the application has been heard."

Third, the single judge to whom the case is assigned grants the Plaintiff's request to convene a three-judge court and that court, after hearing the parties, determines that the constitutional question presented is substantial enough to give it jurisdiction under Section 2282 of the Judicial Code but enters an order denying the Plaintiff's application for an injunction. Here the Plaintiff's remedy is to this Court under Sec-

tion 1253 of the Judicial Code. See *Stainback v. Mo Hock Ke Lok Po,* 336 U. S. 368, 93 L. ed. 741, 69 S. Ct. 606, and *Radio Corporation of America v. United States,* 341 U. S. 412, 95 L. ed. 1062, 71 S. Ct. 806.)

This Appellee urges that the Order of the three-judge court dissolving itself and returning the cause to Judge LaBuy is not an order denying an injunction from which an appeal may be taken to this Court under the provisions of Section 1253 of the Judicial Code. Instead, the Plaintiff should have applied in this Court for a writ of mandamus to compel the reconvening of the three-judge court.

The second Order appealed from is that of Judge LaBuy dissolving the preliminary injunction theretofore entered and dismissing the cause for lack of jurisdiction. This injunction was issued on the basis of the original complaint and prior to the Amendment to Complaint called Count II which contained the allegations of unconstitutionality and the request that a three-judge court be convened. Judge LaBuy's order of dismissal was entered after the procedure under Section 2282 of the Judicial Code had been terminated and the cause had been returned to him. Therefore, he did not enter an order denying an injunction in a suit required by Section 2282 of the Judicial Code to be heard and determined by a three-judge court.

This situation is identical with that found in *Osage Tribe of Indians* v. *Ickes,* 45 F. Supp. 179. Here the three-judge court which had been convened to hear and determine the plaintiff's application for an injunction determined that no substantial question of constitutional law was involved, refrained from passing on the plaintiff's motion, and remitted the case to a single judge for appropriate action. Thereupon that judge dismissed the case on a previously filed motion of the defendant. From this order of dismissal the plaintiff appealed *to the Court of Appeals,* which

affirmed in 133 F. 2d 47 (United States Court of Appeals for the District of Columbia). Certiorari was denied in 319 U. S. 750, 87 L. ed. 1704, 63 S. Ct. 1158.

This Appellee urges that Judge LaBuy's order dismissing the cause is not an order denying an injunction from which an appeal may be taken to this Court under the provisions of Section 1253 of the Judicial Code. Instead, the Plaintiff should have appealed from Judge LaBuy's order to the Court of Appeals, pursuant to the provisions of section 1291 of the Judicial Code.

II

The Orders Appealed from Were Not Entered in a Suit Required by an Act of Congress to Be Heard and Determined by a District Court of Three Judges.

The Appellant relies on Section 2282 of the Judicial Code as requiring his suit to be heard and determined by a district court of three judges. This Section reads as follows:

> "§ 2282. *Injunction against enforcement of Federal statute; three-judge court required*
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968."

In discussing the prior federal statute from which Section 2282 of the Judicial Code was taken, this Court said in *California Water Service Co.* v. *City of Redding*, 304 U.S. 252, at page 254-255:

" . . . We have held that § 266 of the Judicial Code, 28 U.S.C.A. § 380, does not apply unless there is a substantial claim of the unconstitutionality of a state statute or administrative order as there described. It is therefore the duty of a district judge, to whom an application for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented, as otherwise the provision for the convening of a court of three judges is not applicable. . . . The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject. . . . In Oklahoma Gas & E. Co. v. Oklahoma Packing Co. 292 U.S. 386, 391, 78 L.ed. 1318, 1321, 54 S.Ct. 732, we had occasion to observe that 'the three judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay;' that 'that procedure, designed for a specific class of cases, sharply defined, should not be lightly extended;' and that restrictions placed upon appellate review in this court 'would likewise be measurably impaired were groundless allegations thus to suffice.' We concluded that 'when it becomes apparent that the plaintiff has no case for three judges, though they may have been properly convened, their action is no longer prescribed.' "

This Appellee urges that constitutionality of an Act of Congress and an injunction against its enforcement are not actually and substantially involved in this litigation. This Appellee now proceeds to examine the three grounds of alleged unconstitutionality on which the Plaintiff relies in his STATEMENT AS TO JURISDICTION.

First, the Appellant urges that subparagraph (c) of the Union Shop Amendment to the Railway Labor Act, Public Law 914, 81st Congress, 45 U.S.C.A. Sec. 2 Eleventh, is so vague and uncertain that it violates the Fifth Amendment

to the United States Constitution. The "vague and uncertain" allegations are said to arise from the fact that the phrase "national in scope" as found in the Union Shop Amendment is not accompanied by any criteria by which it may be judged.

Let us first consider whether the Appellant is entitled to raise this constitutional question. In general, a person may challenge the constitutionality of a statute only when and so far as it is being, or is about to be, applied to his disadvantage. The general rule is thus stated in 16 Corpus Juris Secundum, Constitutional Law, Section 76, pages 157-161:

> "It is a firmly established principle of law that the constitutionality of a statute or ordinance may not be attacked by one whose rights are not, or are not about to be, adversely affected by the operation of the statute. This rule applies to all cases both at law and in equity, and is equally applicable in both civil and criminal proceedings. . . ."

As this Court said in *Mallinckrodt Works* v. *St. Louis*, 238 U.S. 41, at page 54:

> ". . . As has been often pointed out, one who seeks to set aside a state statute as repugnant to the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, and cases cited."

We now apply this principle to the Appellant. In the prayer paragraph of the Amendment to Complaint the Appellant requests that the court enter "a declaratory judgment holding that the Union Shop Amendment to the Railway Labor Act, Public Law 914, 81st Congress, 45 U.S.C.A. Sec. 2 Eleventh, is unconstitutional . . . for the reason that rights of individual employees are made to

depend upon a phrase 'national in scope,' which is so vague . . .".

An examination of the questioned Union Shop Amendment discloses that:

> Subparagraph (a) establishes the right to make union shop agreements; and
> Subparagraph (c) establishes the privilege for an employee in engine, train, yard, or hostling service *not* to join the labor organization which made the collective bargaining agreement for the craft provided the employee "shall hold or acquire membership in any one of the labor organizations, *national in scope*, organized in accordance with this chapter." (Italics Supplied.)

The Appellant does not attack the validity of union shop statutes or of agreements entered into pursuant to such statutes. He does not assail the Union Shop Amendment to the Railway Labor Act, but only subparagraph (c) thereof. Even if subparagraph (c) should be held unconstitutional, subparagraph (a) would still be valid, for Section 8 of the Railway Labor Act provides (45 U.S.C.A. Sec. 161):

> "§ 161. *Effect of partial invalidity of chapter*
>
> "If any section, subsection, sentence, clause, or phrase of this chapter is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this chapter. All Acts or parts of Acts inconsistent with the provisions of this chapter are repealed. May 20, 1926, c. 347, § 11, 44 Stat. 587; June 21, 1934, c. 691, § 8, 48 Stat. 1197."

Subparagraph (a) authorizes union shop agreements. As appears from paragraph 5 of the Amendment to Complaint, the Brotherhood of Locomotive Engineers made the collective bargaining agreement for the Appellant's craft. He is not a member of that organization, which is the reason for this suit.

Therefore, even if the Appellant should succeed in having the court declare subparagraph (c) unconstitutional he would still not be entitled to employment in his craft because he would not be in compliance with the union shop agreement, which is valid under subparagraph (a).

Thus the Appellant has no property right in the requested declaration of unconstitutionality of the Union Shop Amendment.

Not only has the Appellant no property right to support the requested declaration of unconstitutionality of the Union Shop Amendment, but his allegation that the phrase "national in scope" is vague and uncertain raises no question of constitutional law. In the Court below the Appellant expressly waived any attack on the constitutionality of subparagraph (a) of the Union Shop Amendment, which authorizes the making of contracts between a railroad and the collective bargaining agent for a craft requiring that all employees of the craft join the union which represents the craft. Instead, the Appellant attacks subparagraph (c) which gives to certain employees the *privilege* of not belonging to the collective bargaining agent union, if they belong to another union which is "national in scope." The Appellant alleges that this phrase is vague and indefinite and that the entire Union Shop Amendment therefore is unconstitutional.

The mere statement of the proposition indicates that the object of the Appellant's suit is not to protect some right, either substantive or procedural, which the Fifth Amendment guarantees against encroachment by the Congress. *The statute of which the Appellant complains as unconstitutional merely extends to him a statutory privilege. It excuses him from complying with a statutory regulation, against which he makes no complaint and which would have been valid if it had been enacted without the accompanying privilege.*

A somewhat similar claim of unconstitutionality arising out of a *privilege* was considered by this Court in *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 561. Here it was held that where the legislature of a State authorizes a city to erect its own waterworks but on the condition that it purchase the plant of a company then supplying it, at a valuation to be fixed by judicial proceedings as provided in the act, and the water company institutes proceedings under the act, it cannot thereafter claim that because certain incorporeal rights, franchises and possible future profits were not allowed for in fixing the valuation, that its property was taken without due process of law. As this Court said at page 577:

> ". . . The contentions, therefore, as to the Constitution of the United States are based solely upon the proposition that because the legislature sought to protect the company and save its property from ruin by conferring upon it the privilege of selling its property to the city, if it chose to do so, thereby compulsion and consequent violation of the Constitution of the United States arose. In other words, that because there was conferred a benefit upon the corporation, which the legislature need not have bestowed, and which the company availed of, that its property was taken from it forcibly and without its consent. . . ."

To the same effect is the case of *Cusack Co.* v. *City of Chicago*, 242 U.S. 526, in which this Court held that an ordinance prohibiting billboards is not invalidated by a provision which removes the prohibition as to any billboard the erection of which is first consented to by the owners of a majority of the frontage on both sides of the street in the block in which it is to be erected. As this Court said at page 530:

> "The claim is palpably frivolous that the validity of the ordinance is impaired by the provision that such

> billboards may be erected in such districts as are described if the consent in writing is obtained of the owners of a majority of the frontage on both sides of the street in any block in which such billboard is to be erected. The plaintiff in error cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property. *Tyler v. Judges of Registration*, 179 U.S. 405; *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531. . . ."

It thus appears that the Appellant's claim that the *privilege* accorded him of *not* belonging to the labor union which holds the contract for his class or craft is vague and uncertain and that the entire Union Shop Amendment therefore is rendered unconstitutional has no basis in law. It is small wonder that the three-judge court thus commented on the Appellant's claim of unconstitutionality:

> "In other words, he asserts a vested right in the continuation in force of subsections Fourth and Fifth, [of section 2 of the Railway Labor Act], although the precise basis for this claim is not entirely clear."

The *second* ground urged by the Appellant for unconstitutionality of the Union Shop Amendment is that the National Railroad Adjustment Board and the three-man board which might be set up under Section 3 First (f) of the Railway Labor Act cannot constitutionally undertake to determine what labor organizations are national in scope because of the lack of standards by which to be guided.

In making this charge of unconstitutional lack of standards the Appellant is merely anticipating a defense. The underlying purpose of this suit is of course to save his railroad job. The Appellant's attack upon the constitutionality

of the Union Shop Amendment might properly be answered by the Appellees by asserting a general denial, in which event the issue before the Court would be confined to the question of the constitutionality of the Amendment. On the other hand, the defenses asserted by the Appellees, instead of being a general denial, might allege that the Appellant must seek relief from the threatened discharge by resort to the National Railroad Adjustment Board or to the three-man special board set up under Section 3 First (f) of the Railway Labor Act for the purpose of having either of those tribunals establish that United Railroad Operating Crafts is an organization national in scope. (Some of the Appellees did, in fact, urge this defense.) In that event the constitutionality of the procedure before these Boards would then become an issue in the disposition of the case. Nevertheless, in the absence of a pleading by the Appellees that the Appellant must resort to the procedure before one of these Boards, there would be no occasion under rules of proper pleading for the propriety of their procedure ever to be brought into issue in this case. Therefore, when the Appellant in Count II of his Complaint challenges the constitutionality of the procedure before the Boards he is merely anticipating a defense that may be pleaded.

This Court has held that a party may not create jurisdiction of a three-judge court by anticipating a defense. In *International L. G. W. Union* v. *Donnelly G. Co.*, 304 U.S. 243, the Court said at pages 247-248:

> "This suit was brought on July 5, 1937, by the appellees, Donnelly Garment Company and Donnelly Garment Sales Company, to obtain an injunction restraining the appellants, International Ladies' Garment Workers' Union, its officers and agents, from committing certain acts alleged to be in furtherance of a conspiracy in violation of the Sherman Anti-trust Act and the Clayton Act (15 U.S.C.A. chap. 1). The

conduct sought to be restrained consisted of picketing, boycotting and certain interferences with plaintiffs' business, their employees and customers. Appellee, Donnelly Garment Workers' Union, and its representatives were permitted to intervene and sought similar relief. Their petition in intervention alleged that the defendants (appellants) had not been and were not engaged in a labor dispute within the meaning of the Act of Congress of March 23, 1932, chap. 90, 47 Stat. at L. 70, 29 U.S.C.A. § 101, known as the Morris-LaGuardia Act, nor within the meaning of the Act of Congress of July 5, 1935, chap. 372, 49 Stat. at L. 449, 29 U.S.C.A. § 151, known as the National Labor Relations Act, and that no labor dispute was involved in this litigation. They further stated that 'if the actions and course of conduct of the defendants' were construed to be a 'labor dispute' within the meaning of those statutes, the latter would be unconstitutional, as so interpreted, because in contravention of the Fifth Amendment of the Constitution of the United States and of Article 2, § 30, of the Constitution of the State of Missouri. . . . After the passage of the Act of August 24, 1937, the District Judge certified to the Attorney General that the constitutionality of the Norris-LaGuardia Act and of the National Labor Relations Act had been 'drawn in question.' On the request of the District Judge, a court of three judges was constituted. The motion of the defendants to dismiss the bill and to vacate the temporary restraining order and the motion of the plaintiffs for an interlocutory injunction restraining the defendants from committing the alleged unlawful acts in pursuance of a conspiracy in violation of the Anti-Trust Acts, were then heard. The motion to dismiss was denied and the interlocutory injunction was granted as prayed. 21 F. Supp. 807."

At page 251 the Court said:

"The contention of plaintiffs that the Norris-LaGuardia Act was not applicable to the conduct of defendants and would be invalid if otherwise interpreted

> was but an anticipation of a defense and did not constitute an application for injunction in any proper sense of the term as used in § 3. The only application for an injunction was one to restrain the defendants from committing acts in pursuance of the alleged conspiracy in violation of the Anti-Trust Acts. The statute did not require a decision by three judges upon that application or authorize a direct appeal to this Court."

To the same effect is *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U. S. 377, 66 L. ed. 671, in which this Court said at page 383 of the official report:

> ". . . For, while it is true that a plaintiff by his first pleading determines what right he will sue on, and that the defenses, set up either anticipatorily by him or in due course by the defendant, cannot affect the jurisdiction when it depends on that right, yet the plaintiff may not, by alleging a frivolous claim or a fictitious situation, confer upon a court jurisdiction which, as determined by the plaintiff's real cause of action, it has not."

The *third* ground of attack by the Appellant on the constitutionality of the Union Shop Amendment is that the National Railroad Adjustment Board and the three-man board referred to in Section 3 First (f) of the Railway Labor Act cannot validly pass upon the question of whether the Appellant's union is "national in scope" because they are boards which are private in nature and cannot constitutionally receive a delegation of power to make the determination sought by the Appellant.

Here, again, the Appellant is merely anticipating a defense in an effort to confer jurisdiction on a three-judge court.

Further, a three-judge court may not be assembled to determine whether orders of the National Railroad Adjustment Board or of the three-man board are constitutional.

The purpose of the three-judge court provided in Section 2282 of the Judicial Code is to consider the granting of an injunction restraining the enforcement or operation of an Act of Congress. The court may not be assembled for the purpose of deciding upon the constitutionality (due process) of decisions and orders issued by federal administrative bodies. As this Court said in *Jameson & Co.* v. *Morgenthau, Jr.*, 307 U. S. 171, 83 L. Ed. 1189, 59 S. Ct. 804, at pages 173-174 of the official report:

> ". . . But with these provisions of §266 before it, Congress in enacting §3 of the Act of August 24, 1937, did not refer to 'any statute' or to administrative orders, but confined its requirement to cases of attack upon an 'Act of Congress' upon the ground that 'such Act or any part thereof is repugnant to the Constitution of the United States.' This is not an apt description of administrative regulations or orders. We must regard the choice of language as deliberate and as indicating a limitation deemed to be advisable. It does not appear to have been the intention of Congress that direct appeal should lie to this Court when administrative action and not the Act of Congress is assailed."

The Orders from which the Appellant appeals were not entered in a suit required by an Act of Congress to be heard and determined by a district court of three judges.

Conclusion

The two Orders from which the Appellant appeals were not orders denying an injunction in a suit required by an Act of Congress to be heard and determined by a district court of three judges, and the provisions of Section 1253 of the Judicial Code authorizing an appeal directly to this Court therefore are not applicable. This Court has no jurisdiction of the appeal, and it should be dismissed.

Respectfully submitted,

BURKE WILLIAMSON,
39 South LaSalle Street,
Chicago 3, Illinois,
HAROLD C. HEISS,
RUSSELL B. DAY,
Keith Building,
Cleveland 15, Ohio,
Counsel for Appellee Brotherhood of Locomotive Firemen and Enginemen.

February 24, 1954.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 625

BURTON C. JONES, SR., *Appellant,*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED ASSOCIATION,

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCORPORATED ASSOCIATION, *Appellees.*

MOTION TO DISMISS APPEAL

Comes now Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, an Appellee herein, and moves this Court to dismiss with costs the appeal heretofore taken herein to this Court by Burton C. Johns, Sr., Appellant, on the grounds that the Orders appealed from are not orders denying an injunction in a suit required by an Act of Congress to be heard and determined by a district

court of three judges within the meaning of Sections 2282 and 1253 of the Judicial Code (28 U.S.C. Secs. 2282 and 1253).

BURKE WILLIAMSON,
39 South LaSalle Street,
Chicago 3, Illinois,

HAROLD C. HEISS,
RUSSELL B. DAY,
Keith Building,
Cleveland 15, Ohio,
Counsel for Appellee Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association.

Dated: February 24, 1954.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 625

BURTON C. JOHNS, SR.,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED LABOR ORGANIZATION, AND BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCORPORATED LABOR ORGANIZATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION OF APPELLEE BROTHERHOOD OF LOCOMOTIVE ENGINEERS TO DISMISS

This motion is filed by the appellee Brotherhood of Locomotive Engineers, hereinafter called Engineers, pursuant to paragraph 3 of Rule 12 of this Court, in response to the Statement As To Jurisdiction and other papers filed by appellant, which urge this Court to review on appeal the orders entered by the three-judge court and the one-judge court below.

This action was commenced by appellant in the District Court of the United States for the Northern District of Illinois, Eastern Division, to enjoin the appellee Baltimore and Ohio Railroad Company, hereinafter called the railroad, from discharging him pursuant to a union shop agreement entered into between the appellee railroad and appellee Engineers. The original complaint filed herein did not attack the constitutionality of any Act of Congress but in his amended complaint appellant alleged that the Union Shop Amendment to the Railway Labor Act, adopted in 1951, as Section 2, Eleventh thereof (Act of January 10, 1951, c. 1220, 64 Stat. 1238, 45 U. S. C. Supp. V, 152), was unconstitutional. A specially constituted three-judge court was convened pursuant to the provisions of 28 U. S. C. 2282. On January 20, 1954, the three-judge court entered an order dissolving itself and returning the case to a single district judge for appropriate action on the ground that no substantial constitutional question was presented. On the same day, the one-judge court entered an order dismissing the cause for lack of jurisdiction. Appellant's petition for appeal from both of these orders was allowed by the district judge on February 8, 1954.

Statement

The appellant in his original complaint (Par. 1) invoked the jurisdiction of the district court solely on the theory that the case arose under the Railway Labor Act (48 Stat. 926, 45 U. S. C. 151, *et seq.*). The original complaint alleged that appellant is employed by the railroad as an engineer (Par. 15); that he has complied with all the valid contractual provisions of a union shop agreement entered into between the railroad and the Engineers (Par. 23); but that the railroad has notified him that he is to be discharged on September 19, 1953, for alleged non-compliance with that agreement (Par. 13).

The complaint (Pars. 16-28, inclusive) listed the respects in which appellant claimed that the discharge would be illegal because the railroad had allegedly misconstrued the provisions of the union shop agreement and had failed to comply therewith in its proceedings leading to the notice of discharge as follows:

(1) The agreement only required the maintenance of membership in the Engineers or another labor organization "national in scope" for 60 days after its execution and appellant complied therewith by maintaining membership in the Brotherhood of Locomotive Firemen and Enginemen, hereinafter called Firemen, a labor organization national in scope, for the 60 days following execution of the agreement (Pars. 16, 23).

(2) The agreement permitted any employee to change membership to any labor organization, not limiting the change to one national in scope and appellant by changing membership to the United Railroad Operating Crafts, hereinafter called UROC, fully complied (Pars. 18, 23, 26).

(3) Appellant's membership in UROC constituted compliance with the provision in the union shop agreement requiring membership in the Engineers or some other labor organization national in scope because UROC is national in scope (Pars. 19, 23).

(4) Appellant was excused from maintaining membership in any labor organization because he was denied membership in the Engineers for reasons other than his failure to tender the periodic dues, initiation fees and assessments (Pars. 20-21, 23-24, 26).

(5) Appellant was not required to comply with the union shop agreement because he had never been furnished with a copy thereof.

(6) The railroad in giving appellant a discharge notice was acting wrongfully in that it was acting pursuant to the

alleged policy of the Engineers to use the union shop agreement as a means of destroying a rival labor organization rather than for the purpose intended by Congress, namely to require nonunion employees to join labor organizations (Par. 27).

(7) The procedures followed by the railroad with respect to hearings and decision to discharge appellant were illegal in some six different respects (Par. 28).

The complaint prayed both temporary and permanent injunctive relief restraining the railroad from discharging the appellant for non-compliance with the union shop agreement and a declaration that UROC is a labor organization national in scope. On September 18, 1953, Judge Walter J. LaBuy of the district court issued a temporary injunction as prayed.

Thereafter the appellant with leave of court filed an amendment to the complaint containing a new count, namely, Count II. This count invoked the jurisdiction of the court on two grounds: that the action arose under the Railway Labor Act (Amendment, Par. 1); and that the action also arose under the Constitution of the United States, particularly the Fifth Amendment (Amendment, Par. 2). Count II alleged as follows:

The union shop agreement between the railroad and the Engineers was purportedly entered into pursuant to the provisions of the Union Shop Amendment to the Railway Labor Act (Amendment to Complaint, Par. 10). This amendment restricted and impaired the rights theretofore conferred on the appellant by the Railway Labor Act in that prior to the amendment Section 2, Fourth and Fifth of the Act conferred on the appellant the right to join or not to join a railway labor organization as he saw fit and to be free from the penalty of discharge or other discipline by reason of the exercise of that right, whereas the amendment

authorizes agreements requiring the individual employee as a condition of continued employment to join either the contracting labor organization or "any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services" (id., Par. 12).

The appellant alleges that he joined and maintained membership in UROC and not in any other railway labor organization in the good faith belief that UROC was a railway labor organization, national in scope, within the meaning of the Union Shop Amendment to the Railway Labor Act, and that therefore membership in that organization constituted compliance with the union shop agreement (id., Par. 14) and that nevertheless he is being threatened with discharge solely because the railroad does not regard UROC as national in scope and hence regards him as not in compliance with the union shop agreement.

The appellant alleges that the Union Shop Amendment to the Railway Labor Act is invalid and unenforceable, as being in violation of the due process clause of the Fifth Amendment to the United States Constitution, "for the reason that rights of individual employees are made to depend upon a phrase, 'national in scope,' which is so vague that reasonably intelligent men, in attempting to make the decisions which the Act and agreements pursuant to it require them to make if they desire to continue their employment, can only guess at its meaning" (Amendment, Par. 19). The appellant further alleges that this infirmity is not corrected by construing the phrase "national in scope" in the Union Shop Amendment as having the same meaning as that phrase does in Section 3, where it is used as a qualification for labor organizations which are entitled to select the members of the National Railroad Adjustment Board (45 U. S. C. A. 153(a)) for it is alleged that the phrase as used there is equally unconstitutional (Amendment, Par.

20). It is alleged that the provisions of Section 3, First (f) delegating to a three-man board convened by the National Mediation Board the power to determine the meaning of the phrase, "national in scope" are unconstitutional because they attempt to confer on private persons legislative and judicial powers in violation of Article I, Section 1, Article III, Section 1, and the due process clause of the Fifth Amendment of the United States Constitution (Amendment, Par. 20 (e)).

The appellant therefore alleged that Section 2, Fourth and Fifth of the Railway Labor Act have never been validly amended and hence the union shop agreement between the railroad and the Engineers and his threatened discharge are illegal as a violation of those provisions of the Railway Labor Act (Amendment, Pars. 16, 21, 22).

The appellant accordingly prayed that the court enter a declaratory judgment holding and declaring that the Union Shop Amendment to the Railway Labor Act is unconstitutional as being in violation of the due process clause of the Fifth Amendment to the United States Constitution; that the union shop agreement entered into between the railroad and the Engineers is invalid and unenforceable; and that the appellant cannot lawfully be discharged by reason of any claimed noncompliance with such agreement. The appellant also prayed that the court enter a permanent injunction restraining and enjoining the railroad from discharging the appellant by reason of his alleged noncompliance with the union shop agreement or by reason of the fact that he is a member only of UROC and not of some other railway labor organization.

The Engineers moved to dismiss both the original complaint and the amendment thereto on the ground that the courts lack jurisdiction of the subject matter in that Congress by Section 3 First (i) of the Railway Labor Act has conferred exclusive jurisdiction of suits to restrain the

application or enforcement of a union shop agreement upon the National Railroad Adjustment Board and by Section 3 First (f) of said Act has conferred exclusive jurisdiction to determine whether a labor organization is national in scope upon a three-man board appointed by the National Mediation Board after proceedings before the Secretary of Labor. And as a further ground for dismissing the amendment the Engineers alleged that no substantial constitutional issue was presented.

The Engineers also moved to dismiss both the original complaint and amendment thereto for the failure to state a cause of action for three reasons: that the appellant has failed to exhaust his administrative remedies; that as a matter of law where the status of a labor organization as national in scope is disputed, the courts must treat such organization as not national in scope until it has been found by the three-man board to have that status; that the railroad's decision to discharge the appellant was entirely proper and valid in all respects. In addition with respect to the amendment to complaint, the motion to dismiss also asserted that the Union Shop Amendment to the Railway Labor Act is entirely constitutional and valid.

The amendment to complaint requested that a three-judge district court be convened on the ground that the action sought to restrain the enforcement of an act of Congress as unconstitutional. The three-judge district court was accordingly convened.

On January 20, 1954, the three-judge court handed down an opinion holding that the case was not one requiring the convening of a three-judge district court. The opinion stated several different bases for reaching this result but rested the decision primarily on the ground that appellant had not exhausted his administrative remedies which might result in his case being decided on one or more of the grounds urged in the original complaint without need for

either the administrative agencies or the courts to reach any of the constitutional questions urged in the amendment to the complaint. Among the other reasons impelling the decision, was the circumstance that the various constitutional issues urged by appellant entered the case by way of appellant's anticipation of defenses and hence made pertinent the holding in *International Ladies Garment Workers Union* v. *Donnelly Garment Co.*, 304 U. S. 243, 251, that such anticipation of defenses did not constitute an application to enjoin the enforcement of an act of Congress within the meaning of the statutes requiring the convening of a three-judge court. The three-judge court's doubt as to the substantiality of appellant's attack upon the constitutionality of the Union Shop Amendment was indicated by its reference to *Otten* v. *Baltimore & O. R. Co.*, 205 F. 2d 58 (C. A. 2) as holding that in the absence of accrued vested rights under Section 2, Fourth and Fifth of the Railway Labor Act, which could not be abrogated by amending the statute, an attack upon the Union Shop Amendment did not state a substantial constitutional question requiring the convening of a three-judge court.

The three-judge district court on January 20, 1954 entered an order dissolving the three-judge district court and returning the cause to a one-judge district court. On the same day the one-judge district court entered an order dissolving the preliminary injunction theretofore entered and dismissing the cause for lack of jurisdiction.

Discussion

The order of the one-judge court dismissing the case is obviously not directly appealable to this Court. The order of the three-judge court remitting the case to a single judge for appropriate action is likewise not directly reviewable by appeal to this Court. Moreover that order was clearly correct. The appellant neither presented a substantial

constitutional question nor sought to enjoin the enforcement, operation or execution of an Act of Congress within the meaning of the statute requiring the convening of a three-judge court. The constitutional questions urged, even if substantial, were not presented below because they were neither ripe for decision nor within the jurisdiction of the courts prior to resort to the administrative agencies to decide the nonconstitutional issues which might have disposed of the case without need to reach the constitutional issues.

And irrespective of the appealability or correctness of the orders below the constitutional questions urged are not presented here. None of these questions was decided by either the three-judge or one-judge court below. Furthermore, the same reasons which impelled the three-judge court to dissolve itself, if not correctly jurisdictional, at least warrant judicial abstention, by this Court as well as by the lower courts, until the administrative remedies have been exhausted. Only then will it be known whether appellant's case requires a decision of any of the constitutional issues urged. For the foregoing reasons the appeal should be dismissed.

1. Neither the order of the one-judge district court nor of the three-judge district court is subject to direct appeal to this Court.

The statutes do not make provision for any direct appeal to this Court from an order of a one-judge district court dismissing a civil case, such as the one here involved. The appropriate procedure for review of the order of the one-judge court below is by appeal to the appropriate United States Court of Appeals.[1] *Public Service Commission* v.

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[1] Counsel for appellant have apparently recognized the merit of our position for on February 19, 1954, they filed a Notice of Appeal to the Court of Appeals for the Seventh Circuit from both the order of the three-judge court and the order of the one-judge court below.

Brashear Lines, 312 U. S. 621, 626; *Stainbach* v. *Me Hoch Ke Lok Po*, 336 U. S. 368, 380-381; *Gully* v. *Interstate Gas Co.*, 292 U. S. 16; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386.

The only statutory basis for a direct appeal to this Court from an order of a three-judge district court is an order granting or denying an interlocutory or permanent injunction (28 U. S. C. 1253). No such order was entered by the three-judge district court here. Because of its holding that the case did not present a substantial constitutional question, the only order entered by the three judge court was one remitting the cause to a single district court judge for appropriate action.

The existence of a substantial constitutional question ripe for decision by the courts is a condition to the exercise of jurisdiction by a three-judge court and to the right of direct appeal to this Court. *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171; *Water Service Co.* v. *Redding*, 304 U. S. 252; *Ex parte Buder*, 271 U. S. 461; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 15.[2] The heavy burden which the assembly of three-judge courts and direct appeals impose on the federal courts has resulted in a strict interpretation of cases which require three judges (*Ex parte Collins*, 277 U. S. 565, 569; *Water Service Co.* v. *Redding*, *supra*, at 255; *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 391; *Phillips* v. *United States*, 312 U. S. 246, 250-251; *Smith* v. *Wilson*, 273 U. S. 388; *Rorick* v. *Comm'rs*, 307 U. S. 208; *Gully* v. *Interstate Nat. Gas Co.*, 292 U. S. 16; *Ex parte Bransford*, 310 U. S. 354; *Ex parte Public Bank*, 278 U. S. 101) and a literal construction of decrees "granting or denying * * * an interlocutory or permanent injunction" from which appeals may be taken. *Pendergast* v. *United States*, 314 U. S. 574;

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[2] The applicability of decisions relating to three-judge courts under 28 U.S.C. 2281 has been recognized. *Water Service Co.* v. *Redding*, *supra*, at 254. Decisions under 28 U.S.C. 2281 will therefore be cited as authority without special comment.

American Insurance Co. v. *Lucas*, 314 U. S. 575. Cf. *Pub. Serv. Comm'n* v. *Brashear Lines*, 312 U. S. 621, 625.

Upon deciding that no substantial constitutional question was presented, the three-judge court has no jurisdiction to pass upon the other issues in the case and properly remitted the cause for appropriate action to a single district judge. *Jameson & Co.* v. *Morgenthau, supra; Oklahoma Gas Co.*, 292 U. S. 386, 391-392. The order of a three-judge court declining jurisdiction is not one granting or denying an injunction and consequently is not directly reviewable by appeal. *Pub. Service Comm'n* v. *Brashear Lines, supra;* cf. *Pendergast* v. *United States, supra; American Insurance Co.* v. *Lucas, supra.* Even an order of a three-judge court exercising jurisdiction, if wrongful, cannot be appealed directly here because it is beyond the jurisdiction of this Court to review any order of a three-judge court which has been improvidently convened. *Stainbach* v. *Mo Hock Ke Lo Pok*, 336 U. S. 368, 380-381.

The refusal of a single judge to convoke a three-judge court has consistently been held subject to review by mandamus. *Ex parte Williams*, 277 U. S. 267; *Ex parte Bransford*, 310 U. S. 354; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10. Mandamus would also seem to be the proper remedy for a three-judge court's improper refusal to act. *Ex parte Public Bank*, 278 U. S. 101; *Osage Tribe of Indians* v. *Ickes*, 45 F. Supp. 179, 186-187 (D. C. D. C.). Mandamus will prevent only the question of jurisdiction and will not raise other questions presented by the appeal which the three-judge court did not consider.

The appellant's reliance upon *California Water Service Co.* v. *Redding*, 304 U. S. 252 and *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752 is misplaced. In each of those cases the order appealed from was one by a three-judge district court dismissing the complaint and not an order of a three-judge district court dissolving itself.

2. Even if this were a case for review by direct appeal to

this Court, the three-judge district court correctly held that it should dissolve itself because no substantial constitutional question was presented. The primary basis for this holding was the existence of various non-constitutional grounds which Congress had committed to decision by administrative agencies and which might invalidate the railroad's order of discharge and dispose of the cause without any necessity for decision of the constitutional issue. The three-judge district court relied upon *Aircraft & Diesel Equipment Co.* v. *Hirsch*, 331 U. S. 752, 767, where this Court held that a constitutional issue is not presented for decision by the courts so long as there exist non-constitutional questions to be decided by administrative agencies which may end the case. Cf. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568-574. The opinion below stated, "As in the Hirsch case, plaintiff asserts claims other than those of unconstitutionality which might have disposed of its cause without presenting the constitutional issue". Earlier in the opinion below it had been pointed out that, "in the original complaint, reference is made to some eight to ten respects in which the discharge order, and the interpretation of the union shop agreement implicity (sic) therein", are said to be invalid.

Neither this Court nor the lower federal courts will consider a constitutional question where its resolution is unnecessary to the disposition of the case, irrespective of whether the other questions in the case are for the courts or for an administrative agency.[3]

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[3] With respect to whether the forum for the resolution of these non-constitutional questions is an administrative agency rather than a one-judge district court, the issue is solely one of statutory construction. In three other cases, two of which have followed the usual review procedure of appeal to the Court of Appeals, decision by that court, and then a petition to this Court for a writ of certiorari, this Court has been asked to pass upon this issue of statutory construction. *UROC* v. *Wyer*, 115 F.Supp. 359 (S.D. N.Y.), affirmed per curiam, 205 F.2d 153 (C.A. 2)

If the fact the unresolved non-constitutional issues are for an administrative agency rather than the courts is material to a consideration of whether a constitutional issue urged along with non-constitutional issues is ripe for decision, the court below was correct in holding that the non-constitutional issues here involved are for the administrative agencies.

The grounds set forth in the original complaint for invalidating appellant's notice of discharge involve questions of the construction and application of the collective bargaining agreement between the railroad and the Engineers, of the type which this Court has repeatedly held are within the jurisdiction of the National Railroad Adjustment Board and not the courts. *Order of Railway Conductors* v. *Pitney*, 326 U. S. 255; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239; *Order of Railway Conductors* v. *Southern Railway Co.*, 339 U. S. 255.

Indeed, as the three-judge court below further pointed out, "the case at bar is one of a great number of similar cases now pending, or decided within the past year, prosecuted by UROC or its members to contest the discharge of its members for noncompliance with union shop agreements," "in all of" which "reported cases, with one exception, the courts have held that this issue is a dispute, within the meaning of Section 3 First (1), cognizable by the Board, and that the courts are without jurisdiction," citing *UROC* v. *Northern Pacific Railroad Co.*, 208 F. 2d 135 (C. A. 9) petition for certiorari pending, No. 513, this term; *UROC* v. *Wyer*, 115 F. Supp. 359 (S. D. N. Y.), affirmed per curiam, 205 F. 2d 153 (C. A. 2), petition for certiorari pending, No. 472, this term; *Lake* v. *Baltimore and Ohio Railroad Co.*,

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petition for certiorari pending, No. 472, this term; *UROC* v. *Northern Pacific Railroad Co.*, 208 F.2d 135 (C.A. 9) petition for certiorari pending, No. 513, this term; *UROC* v. *Pennsylvania Railroad Co.*, petition for certiorari pending before decision by the Court of Appeals, No. 548, this term.

31 LRRM 2656 (S. D. Ch., W. D.); and *Pigott* v. *Detroit, Toledo & Ironton Railroad Co.*, 116 F. Supp. 949 (E. D. Mich.). In all of these cases the lower federal courts deemed this Court's decisions in *Pitney, Slocum* and *Southern Railway, supra,* decisive of the proposition that all disputes between an employee and a railroad as to the propriety of a discharge under a union shop agreement are cognizable by the National Railroad Adjustment Board and hence not cognizable by the courts.

3. The three-judge court below likewise regarded itself as improvidently convened in that the appellant's pleadings did not seek to enjoin the enforcement, execution or operation of an Act of Congress within the meaning of the statute requiring the convening of a three-judge court (28 U. S. C. 2282). It regarded each of the appellant's attacks upon the constitutionality of the Union Shop Amendment to the Railway Labor Act as the anticipation of defenses rather than part of appellant's own case, and therefore governed by this Court's decision in *International Ladies Garment Workers Union* v. *Donnelly Garment Co.*, 304 U. S. 243, 251. Just as in the *Donnelly* case the plaintiffs there sought to enjoin certain acts of picketing and boycotting alleged to be in furtherance of a conspiracy in violation of the federal anti-trust laws and urged the unconstitutionality of the Norris-LaGuardia Act merely in anticipation of the defendant's reliance thereon as a defense, so here the appellant sought to enjoin the railroad from discharging him in violation of Section 2, Fourth and Fifth of the Railway Labor Act and urged the unconstitutionality of the Union Shop Amendment to the Railway Labor Act merely in anticipation that this amendment would be pled as a defense to the claim that the discharges were illegal. Thus the instant case is neither one in which the relief sought is an injunction against the enforcement, execution, or operation of an act of Congress, nor is the alleged unconstitutionality

of an act of Congress relied upon by the plaintiff as a part of his own case. For this additional reason the order of the three-judge court dissolving itself was correct.

4. The three-judge court below was likewise correct in its doubts as to the substantiality of the constitutional questions urged. As the opinion below pointed out, appellant "asserts a vested right in the continuation in force of subsections Fourth and Fifth [of Section 2 of the Railway Labor Act], although the precise basis for this claim is not entirely clear." It cited Judge Learned Hand's opinion in *Otten* v. *Baltimore & O. R. Co.*, 205 F. 2d 58 (C. A. 2), that an attack upon the constitutionality of the Union Shop Amendment did not present a substantial constitutional question requiring the convening of a three-judge court in the absence of accrued vested rights under Section 2, Fourth and Fifth of the Railway Labor Act. In the *Otten* case the Court of Appeals for the Second Circuit held that the Union Shop Amendment to the Railway Labor Act, as a repeal *pro tanto* of Section 2, Fourth and Fifth, restored to that extent the preexisting common law validity of union shop contracts.

It is well established that no one acquires any vested rights in legislation which affords him a constitutional basis for attacking its subsequent repeal or modification. "Since the legislature may repeal its own act, it may take away that which has no existence save by virtue of that act. *Seese* v. *Bethlehem Steel Co.*, 168 F. 2d 58, 64 (C. A. 4); *Fisch* v. *General Motors Corp.*, 169 F. 2d 266, 270-271 (C. A. 6), certiorari denied, 335 U. S. 902; *Battaglia* v. *General Motors Corp.*, 169 F. 2d 254, 258 (C. A. 2), certiorari denied, 335 U. S. 887; *Moss* v. *Hawaiian Dredging Co.*, 187 F. 2d 442 (C. A. 9). Cf. *Flanigan* v. *County of Sierra*, 196 U. S. 553, 560.

The insubstantiality of appellant's attacks upon the Union Shop Amendment rests on grounds in addition to the

appellant's attempt to retain as the basis for the relief he here seeks statutory provisions thereby repealed. The contention that the phrase "national in scope" is too vague and indefinite for application, is not well taken. This phrase has been repeatedly used by Congress on prior occasions over the years as a classification for railway labor organizations. Its first use was in Section 3 (a) of the Railway Labor Act, as amended in 1934, to describe those labor organizations which were to be entitled to participate in the selection of members of the National Railroad Adjustment Board (28 U. S. C. 153 (a)). There Congress provided for the construction and application of this phrase by the administrative agencies and procedures there specified.[4] Its next use was in the Railroad Retirement Act of 1937 (45 U. S. C. 228a) and the Railroad Unemployment Insurance Act of 1948 (45 U. S. C. 351), in both instances to define "employer" to include a "labor organization, national in scope," organized in accordance with the Railway Labor Act, for the purpose of determining whether they are covered as to their officers and employees (45 U. S. C. 228a(a) and (b); 45 U. S. C. 351(a) and (d)). Without such express provision by Congress for the construction and application of this phrase in the Railroad Retirement Act and the Railroad Unemployment Insurance

[4] Section 3, First (f) of the Railway Labor Act provides that in the case of a dispute as to whether a labor organization is qualified to participate in the selection of members of the National Railroad Adjustment Board, that is, whether it is national in scope, the Secretary of Labor is directed "to investigate the claim" and, if he finds it "has merit," to notify the National Mediation Board, which, in turn, is directed to constitute a special board of three members to decide whether the claimant "is qualified to participate in the selection of the labor members of the Adjustment Board." One member of such special board is designated by the claimant labor organization, one by the national labor organizations qualified to participate in the selection of the labor members of the Adjustment Board and the third, neutral, member by the National Mediation Board. Paragraph (f) provides that "the findings of such boards of three shall be final and binding."

Act, the Railroad Retirement Board, in administering these statutes, has likewise depended primarily upon the agencies and procedures specified by Congress in the Railway Labor Act on the occasion of its first use of that term, for the administration of this classification of labor organizations.[5] The only court which has considered the issue of how the phrase "national in scope" is to be construed and applied for purposes of the Union Shop Amendment to the Railway Labor Act has held that here too, Congress intended that the construction and application of that phrase be by the procedures and agencies which it provided for the determination of whether a labor organization is national in scope for the purpose of qualifying for membership on the National Railroad Adjustment Board. *Pigott* v. *Detroit, Toledo & Ironton RR Co.*, 116 F. Supp. 949 (E. D. Mich. S. D.). We believe this is correct.

Provision by Congress for determination of the meaning of "national in scope" by an administrative agency eliminates any constitutional objection on the ground of vagueness or indefiniteness of the term. This Court has uniformly held that Congress may validly delegate to an ad-

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[5] The regulations of the Railroad Retirement Board provide that a labor organization which has not established the right to participate in the selection of labor members of the National Railroad Adjustment Board pursuant to the Railway Labor Act "will be presumed not to be a labor organization national in scope organized in accordance with the Railway Labor Act." This presumption, the regulations of the Railroad Retirement Board provide, "can be refuted only by clear and convincing evidence satisfactory to the Board showing that the reasons for the organization's failure to establish such a right have no relation to it being a labor organization, national in scope, organized in accordance with the provisions of the Railway Labor Act." *Federal Register*, Vol. 4, p. 1480, April 7, 1939 (Sec. 202.15 of Regulations under Railroad Retirement Act of 1937); *Federal Register*, Vol. 5, p. 2712, August 1, 1940 (making Sec. 202.15 applicable to Railroad Unemployment Insurance Act). The regulations are set forth in the recent decision of the Railroad Retirement Board in *In the Matter of the Status of the American Railway Supervisors Association, Inc., as an "Employer" Under the Railroad Retirement Act and the Railroad Unemployment Insurance Act*, Docket No. 29, July 1952.

ministrative agency the power to define a broad general term without providing any standards or definitions to guide the agency. Thus it has been held valid to delegate to administrative agencies the definition of the following terms: reasonable rates in the Federal Power Act, *Montana-Dakota Co.* v. *Pub. Serv. Co.*, 341 U. S. 246, 250-252; "excessive profits" in the Renegotiation Act, *Lichter* v. *United States*, 334 U. S. 742, 777-792; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 767-768; coverage under the Renegotiation Act, *McCauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 544-545; "employee" under the National Labor Relations Act, *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, 130-131; "producer" under the Bituminous Coal Act of 1937, *Gray* v. *Powell*, 314 U. S. 402, 411-412; "interurban" in the Railway Labor Act, *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 180-181; "control" under the Federal Communications Act, *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 144-146; "bituminous coal" in the Bituminous Coal Act, *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 399-400.

It is so well established by these decisions of this Court that Congress may properly delegate the definition and application of equally broad and indefinite phrases to a government agency or appointee, that no real issue of constitutional law is presented here for decision. A question of constitutional law which was once substantial ceases to be substantial when it has been thoroughly answered by repeated decisions of the Supreme Court and no longer suffices to confer jurisdiction upon federal courts. *California Water Service Co.* v. *Redding*, 304 U. S. 252, 254, 255; *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, 172.

5. None of the constitutional questions urged by appellant is presented for decision here, even if the order below is appealable and incorrect. All four "Questions Presented" rest upon the assumption that this Court must limit itself

to a consideration of Count II of the complaint.[6] However, as we have already seen, the allegations of Count I were deemed dispositive of the case in the court below. The allegations of Count I set forth the non-constitutional bases upon which appellant attacks the validity of his notice of discharge. It was the fact that these non-constitutional bases were committed by Congress to the National Railroad Adjustment Board, plus the fact that their resolution might eliminate all possible constitutional issues, which compelled the holding that no substantial constitutional question was presented. Hence, Question 1, listed by appellant, is not presented because the question of the meaning of the term "national in scope" may never become material to a determination of whether appellant's notice of discharge should be cancelled. Question 2, listed by appellant, is not presented because the issues which the court below held must be submitted to the National Railroad Adjustment Board were the various issues listed in Count I and did not include decision by that agency of the issue presented by Count II, as assumed in appellant's Question 2.

Nor was Question 2 listed by appellant raised even by Count II, considered alone. In neither count did appellant make any attack upon the constitutionality of the National Railroad Adjustment Board apart from its anticipation that the defendants would point to this agency as having the power to define the phrase "national in scope," as an answer to claims that the phrase was too vague and indefinite. Even this attack by appellant on the National Railroad Adjustment Board was limited to its status as the assumed repository of the power to define the term "national in scope" (Amendment to Complaint, Par. 20).

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[6] In the Statement As To Jurisdiction appellant repeatedly emphasizes that Count I of the complaint was not before the court below and is not before this Court. But the whole complaint was properly considered below and may properly be considered here.

Nor can the issue as to whether a delegation to the National Railroad Adjustment Board to determine the meaning of the phrase "national in scope," would constitute an unconstitutional delegation of legislative and judicial power, possibly be before this Court on any conceivable posture of this record. Neither the court below, nor any other court, nor any of the parties, has ever taken the position that the National Railroad Adjustment Board is to determine the meaning of the phrase "national in scope." The holding in the court below that the National Railroad Adjustment Board was the forum to which appellant should resort for a decision of the various non-constitutional grounds of attack upon his notice of discharge, set forth in Count I did not in any wise constitute a holding that that Board was to itself define and apply the phrase "national in scope." It was the contention of the Engineers set forth in its motion to dismiss, and argued in its brief and in its oral presentation, that while the Adjustment Board was the forum for employees seeking reinstatement with back pay for alleged wrongful discharge under a union shop agreement, the special three man board constituted under Section 3, First(f) of the Railway Labor Act, rather than the Adjustment Board, is the agency to determine the issue of the national in scope status of a union. This is the view adopted by the court in *Pigott* v. *Detroit, Toledo & Ironton Railroad Co.*, 116 Supp. 949 (E. D. Mich. S. D.). Neither the court below, nor any of the other courts, in dismissing for lack of jurisdiction, regarded it as necessary to rule upon the agency to define this phrase.

Question 3 set forth in the Questions Presented section of appellant's Statement As To Jurisdiction, namely, whether a delegation to the Secretary of Labor and the three-man board under Section 3, First (f) of the Railway Labor Act to construe and apply the phrase "national in scope" is constitutional, likewise became material in the

case only if Question 1 was presented and decided in favor of appellant. Count II of the complaint pleads this contention solely as a negation of the supposition that the defense would meet contentions that the phrase "national in scope" was void for uncertainty by pointing to these administrative procedures for rendering it definite (Amendment to Complaint, Par. 20). Moreover appellant's attack upon the three-man board is insubstantial in that the appellant bases his attack upon the assumption that the three man board provided by Section 3, First (f) is a private board. Since the deciding vote on the three-man board is that of the public member appointed by the National Mediation Board, it cannot be regarded as a private board.

Question 4, namely, whether an employee attacking the union shop amendment as unconstitutional must first take that question to the Adjustment Board, again ignores that it was the non-constitutional grounds of attack set forth in Count I, which the court below held were to be taken to the Adjustment Board.

Whether directly appealable here or not, if the order of the three-judge court dissolving itself was correct, none of the four questions, even if presented, can be reviewed here on the merits. *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171, 174; *International Ladies Garment Workers Union* v. *Donnelly Garment Co.,* 304 U. S. 243, 251. If the order of the three-judge court dissolving itself were both directly appealable here and incorrect, still this Court, in accordance with its usual practice of declining to review questions not passed on by the courts below, would decline to pass on the merits of the case. Cf. *Graham* v. *Brotherhood of Firemen,* 338 U. S. 232, 237; *McGoldrick* v. *Compagnie Generale,* 309 U. S. 430, 434.

Conclusion

For the foregoing reasons, it is respectfully submitted that the appeal herein should be dismissed.

CLIFFORD D. O'BRIEN,
RUTH WEYAND,
Counsel for Appellee,
Brotherhood of Locomotive Engineers.

(4216)

MAR 15 1954
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 625

BURTON C. JOHNS, SR.,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED LABOR ORGANIZATION, AND BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCORPORATED LABOR ORGANIZATION,

Appellees.

APPELLANT'S REPLY TO MOTIONS TO DISMISS APPEAL OF APPELLEES BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

EDWARD J. FRUCHTMAN and
RICHARD F. WATT,
Counsel for Plaintiff-Appellant.

COTTON, FRUCHTMAN & WATT,
1943 Board of Trade Bldg.,
Chicago 4, Illinois,
Of Counsel.

THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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This reply brief is submitted pursuant to Rules 7(3) and 12(3) of this Court.

I.

This appeal is taken pursuant to, and the jurisdiction of this Court is predicated upon Title 28, United States Code, Section 1253, which authorizes appeals from "an order granting or denying * * * an interlocutory or per-

manent injunction * * *" in a civil suit "required by any Act of Congress to be heard and determined by a district court of three judges."

Appellees, the Brotherhood of Locomotive Engineers (BLE) and the Brotherhood of Locomotive Firemen and Enginemen (BLF&E), assert there is no jurisdiction in this Court to consider the appeal. The nub of their argument is that the statutory three-judge court (convened on appellant's application pursuant to Title 28, United States Code, Section 2282), which heard and determined appellant's application for an injunction, entered an order merely dissolving itself and returning the cause to District Judge LaBuy for further proceedings in accordance with its opinion; and that the order of dissolution is not "an order * * * denying * * * an * * * injunction" within the meaning of Title 28, United States Code, Section 1253. They assert further that Judge LaBuy's order dismissing appellant's complaint, entered immediately after the return of the cause to him by the three-judge court, even if considered an order denying the injunction prayed for by appellant, is not appealable because the order was not entered by the three-judge court.

Plainly, and appellees apparently so concede, had the three-judge court itself entered an order dismissing the amended complaint, whether for want of equity or want of jurisdiction, such an order would be within the category of "an order * * * denying * * * an * * * injunction." See *United Public Workers* v. *Mitchell*, 330 U. S. 75; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752. Yet the order of dissolution entered by the three-judge court below has precisely the same effect: the denial by the three-judge court, after notice, hearing, and determination by that court, of appellant's application for injunction. The prayer for injunction was denied as surely

and effectively by the dissolution order as by an order denying the injunction in *haec verba.*

Concededly, orders of three-judge courts which do not, in substance and reality, constitute a grant or denial of an injunction are outside the ambit of Section 1253. For this reason this Court has no jurisdiction of appeals from orders staying proceedings before a three-judge court pending the result of state court litigation (*Traffic Telephone Workers Federation* v. *Driscoll,* 332 U. S. 833), from contempt orders (*Pendergast* v. *United States,* 314 U. S. 574), from an order dismissing a counterclaim (*Public Service Commission* v. *Brashear Freight Lines,* 306 U. S. 204), or from orders modifying consent decrees (*American Insurance Co.* v. *Lucas,* 314 U. S. 575). But these cases do not, as appellee BLE mistakenly asserts (BLE Motion, p. 9), require an absolutely "literal construction" of the phrase "an order * * * denying * * * an * * * injunction" as used in Section 1253. They decide no more than that three-judge court orders which do not, in substance and effect, grant or deny injunctions are not appealable under Section 1253. They do not decide that a three-judge court order whose necessary effect is a denial of an injunction is not appealable because it is not technically labeled an order denying an injunction or an order dismissing a complaint.

Stripped of its verbiage the argument of the BLE and the BLF&E boils down to a thinly disguised plea to erect artifice over reality. That reality is that the three-judge court, by dissolving itself, has as effectively denied appellant's prayer for an injunction as if it had entered an order specifically dismissing Count II of the complaint.

Moreover, if there were merit to the view of the BLE and the BLF&E that an order of dissolution in the circumstances here presented is not "an order * * * deny-

ing • • • an • • • injunction" within the meaning of Section 1253, there will have been created a facile mechanism to stultify the direct appeal procedure. Thus, if a three-judge court convened, as here, pursuant to Title 28, United States Code, Section 2282, felt the complaint dismissable either for want of equity or for want of jurisdiction but yet desired to forestall a direct appeal, it could accomplish this by the simple device of an order of dissolution rather than an order of dismissal. The direct appeal procedure has sufficient significance and strength to withstand the assault of so transparent a device.

Finally it should be noted that, under Title 28, United States Code, Section 2282, an injunction "shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this Title." It would seem that if the application is heard by a three-judge court and determined favorably by them, the order granting the injunction in accordance with the determination of the three judges may be issued by a single judge of the court. The significant requirement of Section 2282 is that the application for injunction be "heard and determined" by the three-judge court. The order granting the injunction in accordance with such determination need not be issued by the three judges but may be issued by a single judge of the court. This because the single judge, in such circumstances, is performing a purely ministerial act. Cf. *United States* v. *Hancock Truck Lines*, 324 U. S. 774, 778.

This is essentially what transpired in the case at bar. The three-judge court heard appellant's application for an injunction and determined it adversely to him, holding that it had no jurisdiction because of a lack of a substantial constitutional question. Had the three-judge court acted with an eye to procedural niceties, it would

have entered an order dismissing Count II either for want of jurisdiction or for lack of a substantial constitutional question. Instead, it ordered its dissolution and returned the cause to Judge LaBuy "for further proceedings." Plainly, in the light of the three-judge court's opinion, Judge LaBuy had no possible alternative other than to dismiss the complaint, or at least Count II thereof. Actually Judge LaBuy dismissed the original complaint as well as Count II for "lack of jurisdiction." Patently, so far as Count II is concerned (and Count II was the only portion of the complaint before the three-judge court and the only portion before this Court), Judge LaBuy's action in dismissing it was the exercise of a purely ministerial function.

II.

Appellee, the Brotherhood of Locomotive Firemen and Enginemen, makes the point that appellant's allegation in Count II that Section 2 Eleventh of the Railway Labor Act is unconstitutional in reality raises no constitutional question. The argument runs that Section 2 Eleventh (a) authorizes union shop agreements requiring membership in the contracting union; that Section 2 Eleventh (c) provides an exception to this requirement by giving operating employees such as appellant the right not to join the contracting union providing he joins any other union which is "national in scope"; that appellant's constitutional assault is directed at the "national in scope" language of Section 2 Eleventh (c) rather than at Section 2 Eleventh (a); that if it be assumed that subsection (c) is constitutionally defective, subsection (a) still stands by virtue of the separability clause of the Railway Labor Act (45 U. S. C. A. Sec. 161); that, accordingly, appellant's attack on subsection (c) leaves him trapped by subsection (a) since, admittedly, he is not a member of the contracting union.

The BLF&E's reliance on the separability clause is misplaced. It is hornbook law that a statute, or a section thereof, from which excisions are made on constitutional grounds may still stand provided that the section, *as excised*, is still consonant with and carries out the Congressional intent. *Dorchy* v. *Kansas*, 264 U. S. 286. Where, however, the remnant after the excision is a provision which is plainly at odds with the Congressional intent, the effect of the excision is to invalidate the entire section from which the excision has been made, and this despite the presence of a separability clause. *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *Carter* v. *Carter Coal Co.*, 298 U. S. 239, 311.

So far as operating employees are concerned, subsection (c) is at the heart of Section 2 Eleventh, and if subsection (c) falls, all of Section 2 Eleventh must fall. This is clearly demonstrable from the legislative history of the union shop amendment. Operating employees move back and forth between jobs which have related skills but which are nonetheless in different crafts. For example, a man may for 6 months be a fireman, a craft represented by the BLF&E, be promoted for 2 or 3 months to the job of engineer, a craft represented by the BLE, and then be returned to the job of fireman. This constant "ebb and flow" of employment, which is characteristic of all the crafts in the operating field, posed serious problems for the Brotherhoods representing the five operating crafts. While they desired statutory authority to enter into union shop agreements with the carriers, they uniformly and ardently desired to avoid a situation which would require operating employees either to shift union membership as their jobs changed or to maintain membership in two unions, *i. e.*, the union representing the craft which they were leaving temporarily and the union representing the craft they were entering temporarily. (Hearings, Subcommittee of Com-

mittee on Labor and Public Welfare, 81st Cong., 2d Sess., S. 3295, pp. 67-68.)

S. 3295, 81st Cong., 2d Session, as originally introduced in Congress, required membership to be maintained in the contacting union, with no provisions for achieving compliance by membership in another union (Section (a) of S. 3295, 81st Cong., 2d Sess., First Senate print). Because such a requirement did not meet the "ebb and flow" problem the operating Brotherhoods registered vehement objection (Hearings, Subcommittee of Committee on Labor and Public Welfare, 81st Cong., 2d Sess., on S. 3295, pp. 18-19; Hearings, Committee on Interstate and Foreign Commerce, H. R., 81st Cong., 2d Sess., H. R. 7789, pp. 13, 29-31, 192-193). Thereafter, various amendments were proposed to solve the "ebb and flow" difficulty (see, *e. g.*, House Hearing, pp. 32-33; Senate Hearing, p. 69) and ultimately the Brotherhoods reached agreement (96 Cong. Rec. 16261, 16268, 17055, 17058-17059) on the language which now appears as subsection (c) of Section 2 Eleventh of the Act.

The legislative history thus makes clear that subsection (c) was specifically tailored to avoid the twin difficulties either of requiring operating employees to shift from union to union as their jobs changed or of holding membership in two unions. Subsection (c), as agreed upon by the Brotherhoods, was accepted by the Congressional sponsors of the legislation and voted upon by the Congress with a clear understanding of its purpose and effect (96 Cong. Rec. 16328-16329).

Thus the legislative history of Section 2 Eleventh makes plain the Congressional intention that a simple union shop provision such as contained in subsection (a) of Section 2 Eleventh, although satisfactory with respect to the non-operating field of railroad employment, would not be geared

to the needs and functions of operating employees and their craft representatives and would, in practice, be expensive and unworkable. To meet those needs and functions, and to make union shop agreements in the operating field practicable, subsection (c) was specifically devised. Accordingly, for this Court to adopt the view of the BLF&E that the separability clause of the Railway Labor Act requires subsection (a) of Section 2 Eleventh to be maintained *with respect to operating employees* even if subsection (c) must fall for lack of constitutionality would achieve a result directly at war with a clear and unequivocal expression of Congressional intention. Under such circumstances this Court has consistently refused to give such effect to a separability clause. *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *Carter* v. *Carter Coal Co.*, 298 U. S. 238. *Cf. Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330; *Dorchy* v. *Kansas*, 264 U. S. 286; *Hill* v. *Wallace*, 259 U. S. 44.

Respectfully submitted,

EDWARD J. FRUCHTMAN and
RICHARD F. WATT,
Counsel for Plaintiff-Appellant.

COTTON, FRUCHTMAN & WATT,
1943 Board of Trade Bldg.,
Chicago 4, Illinois,
Of Counsel.

MAR 16 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 625

BURTON C. JOHNS, SR.,

Appellant,

VS.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED LABOR ORGANIZATION, AND BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCORPORATED LABOR ORGANIZATION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

THE BALTIMORE AND OHIO RAILROAD COMPANY'S MEMORANDUM IN OPPOSITION TO THE MOTIONS TO DISMISS THE APPEAL

EDWIN H. BURGESS,
ERICH W. LADEMANN,
SYDNEY R. PRINCE, JR.,
Counsel for Appellee, The Baltimore and Ohio Railroad Company.

The Daily Record Co., Baltimore 3, Md.

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THE BALTIMORE AND OHIO RAILROAD COMPANY'S MEMORANDUM IN OPPOSITION TO THE MOTIONS TO DISMISS THE APPEAL

Opinions Below

The opinion of the three-judge court, as yet unreported, was delivered January 20, 1954. It appears as item 20 of

the transcript on appeal (R. 126).[1] Item 21 sets forth the Order of the same date by that court dissolving itself and returning the case to the Honorable Walter LaBuy, District Judge (R. 137). Item 22 sets forth the District Judge's Order of the same date dismissing the cause for lack of jurisdiction without any further opinion (R. 139).

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1253.

Question Presented

The basic question presented by the motions to dismiss the appeal is whether the issues involved properly required and justified the convening of the special three-judge court under 28 U.S.C. 2282. *Rorick v. Board of Comm'rs*, 307 U.S. 208, 212. The Order of the special three-judge court dissolving itself "pursuant to said Memorandum Opinion" is believed to be the equivalent, under 28 U.S.C. 1253, of an order "denying" the injunction sought from it. This result derives from the fact that, (1) the injunction was sought solely on grounds of unconstitutionality, and (2) the Memorandum Opinion found the non-existence of a substantial constitutional question. The form of Order issued by the three judges "dissolving" and "returning" the case, which was followed by the Order of the single judge "dismissing", has not altered the basic question.

We think that the conjunctive form of the two Orders justifies the appellant in appealing from both Orders. The form of appealing from the Order of the single judge is justified because, as to Count II of the Complaint, it was

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[1] Record references will be to the page number assigned by the Clerk of the District Court in his "Table of Contents".

merely a ministerial act for and on behalf of the special three-judge court. *Zadig v. Aetna Ins. Co.*, 42 F. 2d 142.

Since the single Order of the one-judge court also dismissed the original Complaint, the appeal appears to cover that dismissal, but plainly no appeal to this Court was intended as respects the original Complaint. The entire opposing contention, to the effect that appellant seeks to appeal an order of a single judge, lacks substance and is highly discursive.

Origin Of The Case

Here we state the facts of record only to the extent necessary to expose the jurisdictional problem.

Appellant, Burton C. Johns, Sr., from about 1918 was employed by The Baltimore and Ohio Railroad Company (hereafter referred to as the "B. & O.") in engine service, first as a fireman and later as an engineer. As an employee, in the capacity of engineer, he has been governed in his employment by the provisions of the "schedule agreement" between the B. & O. and the Brotherhood of Locomotive Engineers (hereafter referred to as "B. L. E.") containing the provisions relative to the working conditions, rules and rates of pay of engineers.

The Railway Labor Act, 45 U.S.C. 151 *et seq.*, was amended January 10, 1951, by the addition of paragraph Eleventh to Section 2, 45 U.S.C. 152, Eleventh (c. 1220, 64 Stat. 1238). This Amendment is set forth herewith in Appendix A, and it is hereafter referred to as the "Union Shop Amendment". Pertinently, it authorizes carriers to enter into shop agreements with the labor organization representing each craft or class of employees on each carrier. It provides that those agreements can require members of the craft or class to become members of the labor organiza-

tion representing their craft or class within sixty days. Sub-paragraph (c) of the Union Shop Amendment specified that the requirement of membership in a labor organization "shall be satisfied" in the case of operating employees (which includes engineers) "if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter. . . ."

The B. & O., pursuant to said amendment, entered into a union shop agreement, effective November 1, 1951, with the B. L. E. covering the craft of engineers and requiring the members of the craft to join the B. L. E. (R. 17 to 22). Section 2 of that agreement (R. 17) states, in almost the exact language of sub-paragraph (c) of the Union Shop Amendment, that:

> "The requirements of membership . . . shall be satisfied if any employee shall hold or acquire membership in any one of the labor organizations, other than the Brotherhood [the B. L. E.], national in scope, organized in accordance with the Railway Labor Act . . ."

At no pertinent time has appellant been a member of the B. L. E., though working as an engineer. On November 1, 1951, appellant was a member of the Brotherhood of Locomotive Firemen and Enginemen (hereafter referred to as the "Firemen"), and he continued as a member of that labor organization until about April 1, 1953 (R. 4, 5). Although the Firemen are not the collective bargaining representative of the engineers craft no complaint was made concerning appellant's compliance with the union shop agreement while he continued to be a member of the Firemen. He joined the United Railroad Operating Crafts Organization (hereafter referred to as "UROC") on or about December 30, 1952, believing in all good faith that it was a labor organization "national in scope" within the mean-

ing of the Union Shop Amendment and believing that membership in that organization constituted compliance also with the union shop agreement and the Union Shop Amendment authorizing that agreement (Count II, par. 14; R. 72).

The B. L. E. then cited appellant for non-compliance with the membership requirements of the union shop agreement. The B. & O. notified him of B. L. E.'s charge on July 14, 1953, advising him of his rights under the union shop agreement to a hearing on the charge (Original Complaint, Exhibit E, R. 26). A formal hearing was held July 24, 1953, and in the first decision he was found to be in violation of the union shop agreement (id, Exhibit F, R. 27). By letter of August 6, 1953, he appealed (id, Exhibit G, R. 28). A hearing was held on appeal August 17, 1953, in accordance with the procedure contemplated by the agreement; the stenographic record of the hearing was referred to, read and considered by the B. & O.'s Vice President — Personnel, Frank J. Goebel. That officer on September 9, 1953, on behalf of the B. & O., decided that appellant was not in compliance with the union shop agreement, *in that he did not hold and had not acquired membership in the B. L. E. or any other labor organization "national in scope"*. He was therefore notified that his employment would terminate on September 19, 1953 (Original Complaint, Exhibit I, R. 33 to 35).

Having no further appeal, and no other prescribed remedy, under the terms of the union shop agreement appellant instituted the instant action to enjoin the B. & O. from terminating his employment.

Proceedings Below

Faced with the termination of his employment relationship with the B. & O. effective September 19, 1953, appellant filed his Complaint seeking an interlocutory and per-

manent injunction restraining the B. & O. from discharging him by reason of claimed non-compliance by appellant with the provisions of the union shop agreement. In that Complaint appellant also sought a declaration that UROC is a labor organization "national in scope" *within the meaning of the Union Shop Amendment* (R. 79, 80).

The district court immediately entered an Order, accompanied by proper Findings of Fact and Conclusions of Law, granting the preliminary injunction prayed for (R. 40 to 47).

Jurisdiction in the original Complaint was based upon 28 U.S.C. 1337, providing for original jurisdiction in the district courts of civil actions arising under an Act of Congress regulating commerce. It was alleged that the action arose under the Railway Labor Act, as amended, 45 U.S.C. 151 *et seq.* (R. 3).

On October 16, 1953, the B. & O. filed its Answer admitting the jurisdictional allegations, denying that UROC is a labor organization "national in scope", within the meaning of the statute and the agreement, and praying that upon final hearing the Complaint be dismissed on the merits (R. 59 to 65).

The B. L. E. promptly, and the Firemen, later, sought to intervene; both exhibiting pleadings challenging the jurisdiction of the district court on the ground that the matter in controversy is a labor dispute within the allegedly exclusive jurisdiction of the National Railroad Adjustment Board (R. 53). Their interventions were allowed respectively, December 10 and 17, 1953 (R. 86, 115).

On December 2, 1953, by leave of court, appellant filed an amendment to the Complaint entitled "Count II" in which he asserted an alternative claim to relief (R. 66). The issues arising in this alternative claim for relief are

the issues primarily involved upon this appeal. Those issues will be described below in the Argument. For the present suffice it to say, that in Count II of the Complaint appellant sought a preliminary and a permanent injunction against his discharge upon the allegation that the Union Shop Amendment under which the union shop agreement was made is unconstitutional for carefully specified reasons. Appellant likewise sought a declaration that the union shop agreement is invalid and unenforceable. Because of this constitutional issue thus raised in Count II appellant sought the convening of a special three-judge court pursuant to 28 U.S.C. 2282 on the ground that he seeks to enjoin the operation of the Union Shop Amendment and its enforcement in the union shop agreement (R. 78 to 80).

Again admitting the basic jurisdiction of the district court, likewise founded upon 28 U.S.C. 1337, the B. & O. filed its Answer to Count II (R. 117). The special three-judge court was promptly convened and the matter assigned for argument on January 5, 1954 (R. 89 to 91). Thereupon the B. L. E. served a new motion to dismiss the "Complaint and Amendment to Complaint" notifying counsel that the motion would be called up before the three-judge court on January 5, 1954, as it was (R. 109). Briefs were submitted and argument had before the three-judge court. On January 20, 1954, that Court rendered its Memorandum Opinion, holding in effect that no substantial constitutional question was involved, and it dissolved itself pursuant to that opinion, as already stated (R. 126 to 137). On the same day the single district judge entered his Order dissolving the preliminary injunction and dismissing the entire cause "for lack of jurisdiction" (R. 139). The B. & O. then discharged appellant. Upon further Order of the special three-judge court the B. & O. promptly re-

instated appellant to its employment, as engineer, March 1, 1954, pending the determination of this appeal (R. 261 to 263).

The B. & O.'s Alignment With Appellant On Jurisdictional Issue Is Required By Its Separate And Vital Interests In The Matter.

The B. & O. throughout this litigation has assented to and supported the jurisdiction of the district court and the special three-judge court to adjudicate the vital constitutional issues which the case directly involves. In this Memorandum the B. & O., to that extent agreeing with appellant, supports the jurisdiction of this Court over the appeal.

In its Statement heretofore filed in the district court, the B. & O. explained why it was aligned with appellant in asserting the jurisdiction of the district court even though the B. & O. is a defendant against which the action has been dismissed below. See "Statement of Appellee, The Baltimore and Ohio Railroad Company, To The Supreme Court Of The United States, In Support Of Appellant's Statement As To Jurisdiction", particularly part "V" (R. 245). Implicit throughout that Statement is the B. & O.'s reluctance to be either witness or participant in appellant's loss of his seniority as a railroad employee *without affording him (so far as it lies within the B. & O.'s power to do so) a full opportunity before an adequate tribunal to assert (and, thereby, to "test") his alleged statutory and constitutional rights.* Nevertheless, in some fundamental respects the B. & O. is merely a stakeholder in this litigation.

In its previous Statement the B. & O. dealt chiefly with the primary jurisdiction of the district court. This Memorandum deals chiefly with the jurisdiction of the statutory three-judge court and the right of appeal to this Court.

Admittedly, the B. & O. has at the present time a small monetary interest directly adverse to appellant; it arises out of appellant's probable ultimate claim for temporary loss of employment (about thirty days' time, during the interval between January 20, 1954, and the Order Staying Judgment, February 25, 1954) (R. 261 to 265, incl.). The B. & O. has assessed that potential liability against two more weighty factors, viz., (1) its impending liability under the decision below to terminate the employment of a considerable number of other UROC employees (without having adequate knowledge of their statutory and constitutional rights), and (2) its possible ultimate liability to appellant in damages for final loss of employment (even though the Adjustment Board should deny a claim for "re-instatement"). Upon that assessment the B. & O. finds its interests strongly allied with appellant's effort now to establish his right to a judicial determination of the constitutional issues raised in this litigation, which determination is of vital concern to the B. & O. in carrying out the lawful requirements of the Railway Labor Act. The finding by the special three-judge court of "no substantial constitutional question", coupled with disavowal of jurisdiction on various foreign statutory grounds, is of small worth to the B. & O. as precedent on account of that Court's reliance in part upon alternative grounds.

Argument

Summary Of Argument On The Motions To Dismiss The Appeal

Within the meaning of 28 U.S.C. 2282 the appellant does seek to restrain the operation of the Union Shop Agreement for constitutional repugnance. Appellant in Count II of the Complaint, as an alternative cause of action, expressly seeks *to restrain* the operation of the Union Shop Amend-

ment for repugnance to the due process clause of the Fifth Amendment. The circumstances which brought the application for injunction squarely within the purview of 28 U.S.C. 2282 are the following:

(1) The applicable union shop agreement under the terms of which appellant is threatened with the loss of his job was made under and in the language of the Union Shop Amendment, thereby, for the first time, suspending *pro tanto* as to appellant any rights he otherwise might have under paragraphs Fourth and Fifth of Section 2 of the Railway Labor Act to his job without joining any union.

(2) The union shop agreement is invalid if the Amendment which authorized it is invalid as alleged for repugnance to the Fifth Amendment, as alleged.

The direct appeal is authorized under 28 U.S.C. 1253 because the three judges were convened and did pass upon the question of constitutionality. Their Order, incorporating their opinion, is the substantial equivalent of an Order "denying" an injunction, though it only purported to dissolve the three-judge court.

The three-judge court in reliance upon the valid doctrine that the legislature may constitutionally repeal its own act, in effect held that appellant is without remedy because Fourth and Fifth entitling him to work without joining a union, were repealed by the Union Shop Amendment regardless of its constitutionality. *Congress did not by the Union Shop Amendment repeal* paragraphs Fourth and Fifth of Section 2; Congress merely made it possible for certain parties upon fulfilling certain conditions specified in the Amendment to avoid some of the prohibitions of those paragraphs. Accordingly, the issue of constitutionality is

grave and substantial, unless an invalid, unconstitutional *(arguendo)* statute can authorize a valid contract made in the statutory language.

The underlying federal question as to the constitutionality of the Amendment which alone authorized the agreement under which appellant is threatened with loss of his job, was clearly within the jurisdiction of the district court. Prior resort to the National Railroad Adjustment Board is not required for the "settlement" of questions of this caliber. The Adjustment Board remedy is clearly inadequate. Appellant has no adequate remedy (apart from the course he elected to follow) to protect his job; furthermore, the remedy of common law suit for damages is uncertain and money damages inherently are inadequate.

The matter is one of great importance to the appellant, to the B. & O., to all other UROC members working in the operating crafts on the property of the B. & O., and also to railroads and railroad operating employees throughout the United States.

I.

Within The Meaning Of 28 U.S.C. 2282 Appellant Does Directly Seek To Restrain The Operation Of The Union Shop Amendment For Constitutional Repugnance.

The decision of a special three-judge court, necessarily convened in accord with the requirement of 28 U.S.C. 2282, or similar statute, is appealable to this Court as a matter of right. *Radio Corporation of America v. United States,* 95 F. Supp. 660, 664, affirmed 341 U.S. 412.

Proof that appellant does seek to restrain the "operation" of the Union Shop Amendment is manifest in the manner

in which the Amendment operates. The key to that is in sub-paragraph (d) which provides:

> "Any provision in paragraph Fourth and Fifth of Section 2 of this Act in conflict herewith are to the extent of such conflict amended."

Paragraphs Fourth and Fifth of Section 2, see Appendix A herewith, plainly have not been repealed, either in whole or in part by the Union Shop Amendment. Repeals by implication are not favored. *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, at 456; *United States v. Borden Co.*, 308 U.S. 188, 198; *Wood v. United States*, 16 Pet. 342, 346. In *Markham v. Cabell*, 326 U.S. 404, 411, the Court said:

> "On the contrary the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole."

The first sentence of paragraph Fourth is part of the *Magna Carta* of labor, reading: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." Paragraph Fourth also provides that *it shall be unlawful* for any carrier *"to influence or coerce employees in an effort to induce them to join* or remain or not to join or remain members of *any* labor organization...." (italics supplied). The Union Shop Amendment does not repeal these basic rights. It only modifies them if and when an authorized agreement is entered into.

Thus the Union Shop Amendment allows carriers and bargaining representatives simply to make a specific union shop agreement with specified terms. Until a valid union shop agreement is made by a particular carrier with a particular bargaining representative for the represented craft or class, paragraphs Fourth and Fifth remain as to such parties wholly unchanged in their effect. For illustration, suppose that *without having first entered into a union*

shop agreement with the B. L. E., the B. & O. undertook by various means to persuade, or to otherwise induce, appellant to join the B. L. E. Such action would be clearly unlawful because paragraph Fourth has not been repealed.

Obviously, as to the B. & O.'s engineers, paragraphs Fourth and Fifth are unaffected by the Union Shop Amendment until the B. & O. makes *a valid* union shop agreement with the B. L. E. No railroad union shop agreement (as the term is generally understood) could possibly be valid in the face of paragraphs Fourth and Fifth, unless authorized by paragraph Eleventh, which is the Union Shop Amendment. Since paragraph Eleventh in sub-paragraph (c) provides for alternative membership in other labor organizations "national in scope", the union shop agreement must do likewise to be valid. No union shop agreement applying to the men in the operating crafts could legally deny the entire right of alternative membership, nor could such an agreement legally provide for more restricted alternative membership.

If the option of sub-paragraph (c) in the Amendment as carried forward in the agreement fails for unconstitutionality as alleged, paragraphs Fourth and Fifth entitling appellant to work without joining a union remain in full force. It would be incorrect to suppose, that the Congressional intent to afford a certain option of alternative membership having failed, for lack of due process, the Congress consequently intended to afford no option. The legislative history of the Union Shop Amendment militates forcefully against such a supposition.

Accordingly, it seems plain that the appellant does seek to restrain on the grounds of unconstitutionality the "operation" of paragraph Eleventh of Section 2 of the Act. The only parties that can give it effect so far as concerns

appellant are the B. L. E. and the B. & O. Both are before the Court.

In *Query v. United States*, 316 U.S. 486, applying Section 266 of the Judicial Code, the Court held that the cause was a proper one for a three-judge court and that appeal did not lie to the Circuit Court of Appeals. There suit for injunction was brought to restrain the collection of a South Carolina license tax on the privilege of selling certain enumerated articles. South Carolina undertook to impose the tax upon United States Army Post Exchanges. On their behalf unconstitutionality was asserted; to wit, invasion of Federal sovereignty. The Court said at page 490:

> "Here a substantial charge has been made that a state statute, as applied to complainants, violates the Constitution. Under such circumstances, we have held that relief in the form of an injunction can be afforded only by a three-judge court pursuant to Sec. 266."

The decision is directly applicable. Appellant's right to earn a living is protected by the Fifth Amendment, forbidding deprivation of life, liberty and property without due process of law. To appellant, his right not to be deprived of his job without due process is equal in importance to the right claimed by the Post Exchange to be immune to state taxes.

The validity of appellant's attempt to submit his application for an interlocutory and permanent injunction to a special three-judge court may best be evaluated by consideration of the alternative course of action. If he had *not* sought the three-judge court and had obtained from a single district judge, under Count II of his Complaint, a preliminary or permanent injunction on the ground that (and with a declaration that) the Union Shop Amendment is unconstitutional, the disregard of 28 U.S.C. 2282 would

have been apparent. The general effect in the railroad industry of such a decision would have been immediately observed, and the invalidity of such action on the part of a single district judge would have been evident. Since the statute plainly says that no such injunction "shall be granted" by any district judge alone, the Court of Appeals would clearly have to reverse. The same would be true if the single district judge, *in the absence of a prior three-judge decision*, had dismissed on the merits. *Stratton v. St. Louis S. W. Ry.*, 282 U.S. 10, 18; *Lambert Co. v. Baltimore & Ohio R. R. Co.*, 258 U.S. 377, 383; *Edward Chappel Co. v. Chesapeake & O. Ry. Co.*, 110 F. Supp. 46, aff. 202 F. 2d 149.

II.

This Is A Proper Appeal Under 28 U.S.C. 1253 Because, Regarding Substance, Rather Than Form, The Order Of The Three Judge Court Did "Deny" An Injunction.

It is alternatively contended by the B. L. E. (1) that this is an appeal from an order of a "one judge district court" (of course, such an order is not subject to direct appeal to this Court), and (2) that the Order of the three-judge court is not appealable under 28 U.S.C. 1253 because it was merely an order "remitting the cause to a single district court judge for appropriate action". It must be observed, however, that the Order of the three-judge court (R. 137) — of whom the single judge was one — was made "pursuant to said Memorandum Opinion". Actually, upon the score of "appropriate action" it left nothing to the judgment of the single judge with regard to Count II. Cf. *Patterson v. Mobile Gas Co.*, 271 U.S. 131. It presents and roundly condemns the anomalous situation in which a single judge on the final hearing might reconsider and decide questions already passed upon by three judges on an

application for an interlocutory injunction. Indeed, a careful reading of the Memorandum Opinion of the three judges indicates that really they also disposed of the critical question of jurisdiction under the original Complaint. Before the words "or permanent" were added to the provisions of Section 266 of the Judicial Code (28 U.S.C. 380, 1940 ed.) it was clearly established that if the interlocutory injunction was not sought the single judge could determine the case. It was said that, "The complainant has an election". *Stratton Case*, id. at page 15. Now, however, if the B. L. E. is right in its contentions, an "election" resides in the special three-judge court, subject only to the form of order it chooses to enter. (Of course, under 28 U.S.C. 1253, appellant has no election, but that negative raises no election in the defendants or the court.) If B. L. E. is right in its contentions the mere form of the Order issued by the special three judge court has placed appellant in a predicament, and deprived him of his right of direct appeal. Obviously the price of continuing the constitutional cause of action, in Count II, before a single district judge to a successful conclusion (though entirely unlikely) is nevertheless reversal by the Circuit Court of Appeals. The Supreme Court said:

> ". . . a single district judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits, as he would be to grant either an interlocutory or permanent injunction." *Stratton Case*, id. page 15.

In the *Stratton Case*, supra, after a decree of a single judge dismissing on the merits, the plaintiff appealed to the Circuit Court of Appeals, and, for the reason appearing in the above quotation, the Supreme Court said:

> "Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain an appeal

> would defeat the purpose of the statute of substituting a decree of a single judge and an appeal to the Circuit Court of Appeals for a decree of three judges and a direct appeal to this Court". (id. page 16.)

In that case the Circuit Court of Appeals had reversed the district court upon the merits, and that had the effect of causing defendant to appeal to the Supreme Court. Those developments would not occur in this case since the Circuit Court of Appeals would not entertain such an appeal or decide it upon the merits. In the *Stratton Case*, supra, those fortuitous developments did afford to this Court an opportunity to set matters aright. The Court did that through the following statement:

> "The remedy by mandamus to vacate the decree and to require the District Judge to call to his assistance two other judges, as directed by the statute, to hear the application for an interlocutory injunction, is still available. It is not necessary, however, that formal application should be made for such a writ, as *the District Judge may now proceed to take the action which the writ, if issued, would require*". (Italics ours.)

It is respectfully submitted by the B. & O. that appellant has not really entered into the described, revolving labyrinth at all. The mistaken notion that he has done so is derived from a misunderstanding by B. L. E. of the following statement in the *Stratton Case* appearing at pages 15 and 16:

> "If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement".

That statement applied to a case where no three-judge court had passed upon the matter; but has no application to the situation in this case. The purpose of this Section (2282), as of former Section 380, is to avoid improvident action by a single judge, *Phillips v. United States*, 312 U.S. 246, 251, and to avoid "precipitate determinations on constitutionality", *Ex parte Bransford*, 310 U.S. 354, 362. Those purposes have been fully met in the handling of this case. As the Court said in the *Stratton Case*, id. at page 17, "The requirement of the statute has regard to substance and not to form". Admitting that the assembly of three-judge courts and direct appeals does impose a heavy burden on the Federal Courts and requires a strict interpretation as to the requirement, the B. & O. fails to apprehend the applicability here of the idea: First because, the three-judge court has already convened and functioned; and second, because, we see no benefit to this Court in having the issue presented as a motion for leave to file a petition for mandamus directed to the district courts.

III.

A Substantial Constitutional Question Does Exist.

To justify the decision of a special three-judge court the constitutional question must, of course, be substantial. *Jameson & Co. v. Morgenthau*, 307 U.S. 171. Lack of substantiality in a constitutional question, as in the case of a "federal question" may appear either, (1) because it is obviously without merit or, (2) because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject. *Water Service Co. v. Redding*, 304 U.S. 252, 255. Neither of the two grounds is established here.

The Memorandum of Opinion of the three-judge court summarizes the constitutional infirmity attributed to the

Union Shop Amendment by the appellant in the following statement:

> "The constitutional infirmity said to be revealed by these facts is that the union shop amendment is in violation of the Due Process Clause of the Fifth Amendment to the Constitution, in that the rights of employees to continued employment are made to depend on the phrase 'national in scope' which is so vague that reasonably intelligent men can only guess at its meaning; that this infirmity is not cured by construing the phrase as it is used in Section 3 of the Act as a qualification for labor organizations entitled to participate in the selection of members of the National Railroad Adjustment Board (45 U.S.C. 153(a)), for it is averred that the phrase, as there used, is equally unconstitutional; that the provisions of Section 3, First (f) delegating to a three-man board convened by the Mediation Board the power to determine the meaning of the phrase are an unconstitutional delegation to private persons of legislative and judicial powers in violation of Article I, Section 1, Article III, Section 1 and the Due Process Clause of the Fifth Amendment of the Constitution of the United States; that, therefore, subsections Fourth and Fifth of Section 2 of the Act have never been validly amended; and that the union shop agreement between the Engineers and the Railroad, and plaintiff's threatened discharge are illegal as a violation of those provisions of the Act."

No one can find fault with that summary, but the three-judge court then said:

> "In other words, he asserts a vested right in the continuation in force of subsections Fourth and Fifth, although the precise basis for this claim is not entirely clear."

The conclusion gives effect to the B. L. E.'s present reliance on the following doctrine: "Since the legislature may repeal its own act, it may take away that which has

no existence save by virtue of that act". The B. L. E. cited certain of the decisions involving the Portal-to-Portal Act of May 14, 1947, 29 U.S.C. 251 *et seq.*, among others *Seese v. Bethlehem Steel Co.*, 168 F. 2d 58, 64. The cases are not in point because there the unqualified intent of Congress to repeal parts of the Fair Labor Standards Act *with valid qualifications* was clear. Section 2 of The Portal-to-Portal Act, 29 U.S.C. 252, in paragraphs (a), (1) and (2) expressly saved claims for compensation dependent upon either express contractual provisions or upon custom and practice. How the matter would have stood without such validating qualifications was not decided. Indeed, in *Seese v. Bethlehem Steel Co., supra*, at page 65, relative to Section 2(d), denying jurisdiction to courts to entertain such claims, the Court of Appeals said:

> "Whether the denial of jurisdiction would be valid if the provision striking down the claims were invalid is a question which does not arise."

An unconstitutional proviso added to an existing statutory provision by a subsequent legislative act is treated as a nullity allowing the original to stand. *Frost v. Corporation Commission*, 278 U.S. 515, 526; *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28, 47.

Had paragraphs Fourth, Fifth and Eleventh of Section 2 of the Railway Labor Act been enacted simultaneously, then invalidity of paragraph Eleventh might have voided paragraphs Fourth and Fifth under the following rule taken from *Davis v. Wallace*, 257 U.S. 478, at 484, where the Court said:

> "Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which it was intended to qualify or restrain."

Here we have paragraphs Fourth and Fifth of Section 2 added to the Railway Labor Act by the Act of June 21, 1934, c. 691, sec. 2, 48 Stat. 1186 — more than sixteen years before the Union Shop Amendment was added. Those paragraphs were plainly capable of separate validity. *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 560.

In *Otten v. Baltimore & O. R. Co.*, 205 F. 2d 58 (CA-2), the alleged unconstitutionality of the Union Shop Amendment was laid to a supposed conflict with the First Amendment which protects one against action by the Government. The Order affirming a denial of a preliminary injunction does not touch the basic allegation of unconstitutionality asserted here by appellant. Nevertheless the following statement in the opinion, page 60, is pertinent if correct:

> ". . . plaintiff must insist that Subsection Eleventh is unconstitutional because it repealed Subsection Fifth so far as it had affected 'union shop' agreements; and that it affirmatively legalized them. That, however, is plainly a misconception of its effect, which was equivalent only to a repeal, *pro tanto*, of Subsection Fifth."

That assumes that a valid act can be amended by an invalid act. The law is otherwise according to *Davis v. Wallace*, *supra*, "because an existing statute can not be recalled or restricted by anything short of a constitutional amendment" (Page 485). Appellant does not base the unconstitutionality of the Union Shop Amendment upon the effect it has upon the prior statutory law (as did the plaintiffs in The Portal-to-Portal Act cases); instead he alleges unconstitutionality on grounds utterly distinct from the earlier statutory law.

In *Truax v. Raich*, 239 U.S. 33, an alien was faced with discharge by his employer on account of "An act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona" (re-

quiring the employment of native-born citizens to extent of 80%). Alleging that the Arizona statute violated the Fourteenth Amendment Raich sought an injunction against its enforcement. The Court said:

> "The application for an interlocutory injunction and the motion to dismiss were then heard before three judges, as required by Sec. 266 of the Judicial Code. . . . This direct appeal has been taken".

The Court affirmed the Order issuing the injunction, saying, at page 38:

> "The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law".

Raich was suing to restrain a state statute operating directly upon his employer and was allowed to do so despite the objection that a complainant "can not sue save to redress his own grievance". The Court thought it would "be idle to call the injury indirect or remote". See *Barrows v. Jackson*, 346 U.S. 249, 258.

In the administrative proceedings under the union shop agreement appellant did not urge the constitutional questions presented in Count II of the Complaint. Accordingly, the B. & O. in its decision that UROC was not "national in scope" (R. 33 to 35) presumed the constitutionality of the Union Shop Amendment, and the B. & O. relied upon the same presumption in its Answer to "Count II" (Paragraphs 16 *et seq.*, R. 119, 120). Thus it is evident that the B. & O. is only committed to a presumption of constitutional validity; such a presumption does not foreclose the existence of "substantiality" in the constitutional attack.

The B. & O. does not regard the attempted reference of the term "national in scope" to the Secretary of Labor under Section 3, First (f) of the Railway Labor Act as presenting any substantial question of statutory interpreta-

tion. Paragraph (f) expressly covers only the identification of labor organizations "national in scope" under paragraph (a) and "national labor organizations" under paragraph (c). Those paragraphs are concerned only with the right to participate in the selection of the "labor members" of the National Railroad Adjustment Board. This appeal, therefore, does not depend primarily upon questions of statutory interpretation. *Ex Parte Buder*, 271 U.S. 461, and *Ex Parte Poresky*, 290 U.S. 30, are not in point.

IV.

The Adjustment Board Does Not Have Exclusive Jurisdiction, Nor Even Precedent Jurisdiction.

In its previously filed Statement supporting the appeal the B. & O. undertook to show the existence of a substantial federal question under 28 U.S.C. 1337. Reference is made to that Statement, Point "II", entitled "The Jurisdiction Of The District Court Over The Sort Of Matters In Controversy Is Well Founded" (R. 248 to 250).

In that Statement the B. & O. also dealt with the contention of the B. L. E. that the Adjustment Board has exclusive primary jurisdiction and affords an adequate remedy. Those contentions are unsound. The Court is respectfully referred to that Statement, pages 6 to 10 (R. 250 to 254).

V.

Administrative Decision By The Adjustment Board Of The Non-Constitutional Questions Can Not End The Case Or Afford Appellant An Adequate Remedy: Aircraft And Diesel Equipment Co. v. Hirsch, Distinguished.

The Memorandum Opinion places great reliance upon the decision in *Aircraft and Diesel Equipment Co. v. Hirsch*, 331 U.S. 752, and particularly upon the Court's holding, at page 772, where the Court found the presence of constitutional issues, accompanying other issues, "a strong reason

for not allowing this suit either to anticipate or to take the place of the Tax Court's final performance of its function." The Court continued:

> "When that has been done, it is possible that nothing will be left of appellant's claim, . . . concerning which it will have basis for complaint."

The distinction appears quite clearly in the next two sentences, which the three-judge court did not quote. There, at page 772, the Supreme Court continued as follows:

> "The Tax Court may decide entirely in appellant's favor. Indeed, if it can sustain there the claims and issues it offers to support here, that possibility is not an unlikely one."

Could the Court make such a statement in this case; could it, in particular, find that the possibility of appellant's success before the Adjustment Board is "not an unlikely one"? We think not.

Here it is necessary, in order to find the existence of administrative questions, for the Court to search the original Complaint. It may be doubted whether this is proper in itself. Assuming, however, that it is proper in this appeal for the Court to search the original Complaint to find administrative questions, it will be observed that the chief, and only really suitable question raised for administrative decision, say by the Adjustment Board, arose under Paragraph 12 of the original Complaint (R. 7). There it appears that the appeal hearing under the union shop agreement was conducted by the same officer who had made the decision appealed from. However, a superior officer of the B. & O. made the decision. He had before him a court reporter's transcript of the statements made on appeal and, since no question of credibility arose, the appellant was not prejudiced in this respect (R. 33 to 35).

But if it were otherwise, and if the alleged technical defect would justify the Adjustment Board in reversing the action of the B. & O., *still such a decision would not dispose of the real issue in the case.* The B. L. E.'s complaint that appellant was in violation of the union shop agreement would still be pending, undecided. Since no doctrine of "double jeopardy" applies, another hearing would be held and the same decision by the B. & O. could be reasonably anticipated. In the same circumstances, from the other point of view appellant's complaint of threatened job loss for noncompliance with an agreement authorized only by an unconstitutional *(arguendo)* statutory amendment would still be pending and undecided.

The Memorandum Opinion of the three judges states that—

> "In the original complaint reference is made to some 8 or 10 respects in which the discharge order, and the interpretation of the union shop agreement implicity *(sic)* therein . . .", are said to be invalid.

Apart from the question concerning the propriety of the decision being made by a railroad official other than the one who presided at the appeal hearing, *all the other questions of invalidity relate to the interpretation of language in the union shop agreement, which is simply a restatement of the language appearing in the Union Shop Amendment.*[2]

---

[2] There was also an allegation in paragraphs 22 and 23 that appellant was not given a copy of the union shop agreement (R. 12, 13). Just what kind of Adjustment Board dispute that presents we are uncertain. On page 4 of the letter of August 6, 1953, constituting appellant's union shop administrative appeal (R. 31), it was argued that the appeal hearing should be held in Chicago rather than in Baltimore — but that claim actually presents no sort of decisive labor dispute. All of the alleged defects in B. & O.'s handling of the issue are summarized in paragraph 28 of the original Complaint (R. 16), but they do not (except as already noted) raise issues of the sort ordinarily submitted to the First Division.

The numerous points of distinction between this case and the *Hirsch Case* (331 U.S. 752) can be readily observed by some quotations from that opinion. At pages 768, 769, the Court said, after referring to the presumed congressional intent of obtaining "expertness of judgment":

> "This policy was followed and reenforced in the provision for Tax Court redetermination. And that provision was chosen deliberately in preference to judicial review in the Court of Claims or elsewhere, primarily because of the Tax Court's expertness in fiscal matters analogous to those arising in connection with renegotiation problems, *as well as its essentially judicial procedures and experience.*" (Italics ours.)

The Adjustment Board definitely does not possess "judicial experience" nor does it follow "judicial procedures."

As the Court stated in *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, at page 243:

> "The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon."

The only substantial questions (other than the constitutional questions) which might be referred to that Board (viz., the First Division) arise in that language of the union shop agreement which is borrowed from the Union Shop Amendment. Some of these questions are:

(1) Does the Union Shop Amendment authorize agreements to require membership for more than sixty days after the execution of the agreement? (Original Complaint, par. 16).

(2) Does the proviso in paragraph (c) of the Amendment authorize an operating employee to change membership after sixty days to any labor organiza-

tion, including those not "national in scope"? (id., pars. 18, 23, 26).

(3) Does the constitution of the B. L. E. operate to deny him membership on grounds inadmissible under the proviso of paragraph (a) of the Amendment? (id., pars. 24, 26).

We think the applicable rule is stated in *Miller v. Burger*, 161 Fed. 2d 992 (CA-9) where the Court stated, at page 994:

> "It is not to be doubted that in the final analysis statutory construction is a legal function, and if the Board (under the facts of this case) can construe the language of the Act, the Courts can examine that construction and determine its validity or invalidity." (References are to the Social Security Board and to the Social Security Act. 42 U.S.C. 401 *et seq.*)

As this Court said in *Social Security Board v. Nierotko*, 327 U.S. 358, at page 369:

> "Administrative determinations must have a basis in law and must be within the granted authority. Administration, when it interprets a statute so as to make it apply to particular circumstances, acts as a delegate to *(sic)* the legislative power."

In respect to limitations upon the authority of administrative interpretations of statutes, see *Labor Board v. Hurst Publications*, 322 U.S. 111, 131, and *Gray v. Powell*, 314 U.S. 402, 411.

Railroad employees have been allowed to maintain injunction suits in order to vindicate their statutory rights derived from the Railway Labor Act in the following cases: *Texas & N. O. R. Co. v. Brotherhood*, 281 U.S. 548; *Steele v. L. & N. R. Co.*, 323 U.S. 192; *Tunstall v. Brotherhood*, 323

U.S. 210; *Graham v. Brotherhood*, 338 U.S. 232; and *Brotherhood v. Howard*, 343 U.S. 768. All of these cases, except the *Steele Case* involved enforcement of statutory rights despite inconsistent provisions of collectively bargained agreements. In the *Howard Case*, at page 774, the Court said:

> "The claims here can not be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board. . . . This dispute involves the validity of the contract, not its meaning."

It appears that a question involving the validity of the contract for statutory repugnance presents a federal question outside the jurisdiction of the Adjustment Board. By the same token the issue here involves the validity of both the contract and statute for alleged constitutional repugnance; hence it presents a constitutional question outside the jurisdiction of the Adjustment Board.

Further distinction applicable to the *Hirsch Case, supra*, is found in the fact that the Second Renegotiation Act, 50 U.S.C., App. 1191 (e) (1), expressly provided that the Tax Court shall have "exclusive jurisdiction, by order, to finally determine" the amount of excessive profits, if any. No such unequivocal command establishes the alleged exclusive jurisdiction of the Adjustment Board. In the *Hirsch Case* the Court reserved opinion upon the "finality of Tax Court decisions in these matters." On the other hand, under the Railway Labor Act a decision of the Adjustment Board is expressly made "final and binding" by Section 3, First (m), and no appeal is allowed under Paragraph (p) of that Section, except a successful "petitioner" may bring an enforcement action.

The opinion in the *Hirsch Case* said that ordinarily the issues relating to the exhaustion of administrative remedies and to the existence of equitable jurisdiction are entirely distinct but it added at page 764:

"In this case, however, the exhaustion problem and that of equity jurisdiction are closely, indeed inseparably, related."

That statement may well be applicable to the instant case.

Conclusion

For the reasons stated above, The Baltimore and Ohio Railroad Company, appellee herein, respectfully urges the Court to deny the motions to dismiss this appeal.

March 15, 1954.

Respectfully submitted,

EDWIN H. BURGESS,

ERICH W. LADEMANN,

SYDNEY R. PRINCE, JR.,

Counsel for Appellee, The Baltimore and Ohio Railroad Company.

B. & O. Central Building,
Baltimore and Charles Streets,
Baltimore 1, Maryland.

APPENDIX A

Railway Labor Act of 1934, as Amended 48 Stat. 1186 (1934), 45 U.S.C. §152 (1946), as amended 64 Stat. 1238 (1951) 45 U.S.C. §152 (1952 Supp.); 48 Stat. 1187 (1934), 45 U.S.C. §153 (1946)

§152. General Duties.

* * * * * *

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden.

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

* * * * * *

Eleventh. Union security agreements; check-off.

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of

its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of subsection (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition

of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§153. National Railroad Adjustment Board.

First. Establishment; composition; powers and duties; divisions; hearings and awards.

There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise

designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheetmetal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by

the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suits the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

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